LIBRARY
SUPREME COURT, U. S.

APPENDIX C

Office-Supreme Court, U.S.
FILED
JAN 12 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

APPENDIX C TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID L. BENETAR
NORDLINGER, RIEGELMAN,
BENETAR & CHARNEY
420 Lexington Avenue
New York, New York 10017
Counsel for Petitioner

ROBERT C. ISAACS
MICHAEL I. BERNSTEIN
STANLEY SCHAIR
Of Counsel

INDEX TO APPENDIX.

	PAGE
Decision and Order	C- 1
Order	C- 10
Member Jenkins, concurring	C- 11
Member Leedom, dissenting in part	C- 15
Table of Contents of Intermediate Report	C- 22
Intermediate Report	C- 26
Statement of the Case	C- 27
Findings of Fact	C- 28
I. The business of the Company	C- 28
II. The labor organizations involved	C- 28
III. The unfair labor practices	C- 28
A. The issues presented by the pleadings	C- 28
B. As to IUE's status as bargaining representative	C- 31
C. Background of 1960 negotiations	C- 37
1. GE's general approach to collective bargaining	C- 37
2. Preparations for 1960 negotiations	C- 45
3. Prenegotiation meetings	C- 54
D. GE's refusal to bargain on June 13, 1960 with respect to its personal accident insurance proposal	C- 56
E. Presentation of IUE's contract proposals to GE on June 13, 1960, and GE's communications to employees with reference thereto in advance of bargaining	C- 60
F. The 1960 negotiations as a whole	C- 65
1. Arrangements for negotiations	C- 65
2. Chronology of more significant dates and events	C- 67

PAGE

3. Employee communication during the period of negotiations—in general .. C- 69
G. The early meetings on the subject of employment security—July 19 to August 11 ..... C- 74
H. Meetings on Union's general demands, prior to submission of GE offer, August 16 to 25 ..... C- 84
I. August 29 and 30: GE presents its offer to the Union ..... C- 88
J. GE presents its offer directly to employees ..... C- 94
K. Negotiating meetings August 30 through September 8 ..... C-102
L. The revision of GE's offer to include holiday-vacation options C-108
M. The resolution at the IUE convention for a September 25 vote on the recommendations of the negotiating committee C-111
N. GE's reaction to the Union's call for a vote C-112
1. Introduction C-112
2. GE attempts to induce Local officials and employees to alter the time and place of voting and the question to be voted on C-113
3. GE announces to employees that its offer is now final and reiterates its policy not to make concessions because of a strike or threat of strike C-116

PAGE

4. GE intensifies its attack upon the motives of IUE's leadership C-119
5. GE makes its offer effective for non-represented employees C-120
6. GE in its communications emphasizes danger to employee job security if its offer were enlarged or if a strike ensued C-125

O. Negotiating meetings between September 20 and October 1 ..... C-132

P. Alleged local bargaining; other events during the strike C-148

1. Offer at Schenectady and Pittsfield of more favorable truce terms than those theretofore offered the Union C-148
2. Direct dealings with other IUE locals regarding truce terms C-151
3. Employee communications C-155

Q. Negotiating meetings October 4 to October 19 ..... C-158

R. The strike settlement meetings on October 21 and 22 ..... C-162

S. Postsettlement meetings C-168

T. Alleged threat and discrimination at Augusta, Georgia C-173

U. The alleged independent violations of Section 8(a)(5) and (1) C-175

1. Preliminary statement C-175
2. Refusal to furnish information C-176

a. The specific allegations of the complaint C-176

PAGE

b. The applicable facts C-177
c. Consideration of Respondent's defenses and concluding findings C-187
3. Local bargaining C-194
V. Analysis and concluding findings as to the alleged overall bad-faith bargaining C-206
W. The strike as an unfair labor practice strike C-252
X. The discriminatory refusal to reinstate strikers C-253
IV. The effect of the unfair labor practices upon commerce C-254
V. The remedy C-254
Conclusions of Law C-257
Recommended Order C-258
Appendix A—List of employees to be made whole for any loss of pay C-263
Appendix B—Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act C-264

C-1

The original pagination of the Board's Decision and Order is indicated not only in the top righthand corner of each page, but also by a space of several lines in the text and the insertion of the original page number therein.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

GENERAL ELECTRIC COMPANY,
and
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO.

Cases Nos. 2-CA-7581-1,
7581-2,
7581-4,
7864 (Post 10-CA-4682).

Decision and Order.

On April 1, 1963, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent, the General Counsel, and the Charging Union filed exceptions to the Intermediate Report and supporting briefs.[1] On May 7, 1964, the Board heard oral argument at

[1] The General Counsel and Charging Union were granted permission to file and did file briefs in reply to the Respondent's exceptions and brief.

Decision and Order.

Washington, D. C. All parties were represented by counsel and participated in the argument.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in the case, including the oral argument, the exceptions, and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

The Trial Examiner found that Respondent had not bargained in good faith with the Union, thereby violating Section 8(a)(5)[2] and (1) of the Act as evidenced by:

2

(a) Its failure timely to furnish certain information requested by the Union during contract negotiations.

(b) Its attempts, while engaged in national negotiations with the Union, to deal separately with Locals on matters which were properly the subject of national negotiations, and its solicitations of Locals separately to abandon or refrain from supporting the strike.

(c) Its presentation of its personal accident insurance proposal to the Union on a take-it-or-leave-it basis.[3]

---

[2] Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 8(d) defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract . . . ."

[3] For the reasons set forth in his dissent in *Equitable Life Insurance Company*, 133 NLRB 1675, 1677, Member Fanning would not find that Respondent's refusal to bargain in regard to the insurance plan was unlawful. However, he believes that Respondent's take-it-or-leave-it position on June 13 can be properly considered in gauging its overall good faith in negotiations.

(d) Its overall approach to and conduct of bargaining.

We agree with these findings of the Trial Examiner. Because Respondent's defense of its bargaining conduct raises a fundamental question as to the requirements of the statutory bargaining obligation, we have stated for more particular emphasis the reasons why we agree with the Trial Examiner that Respondent did not bargain in good faith with the Union.

In challenging the Trial Examiner's finding that it violated Section 8(a)(5), Respondent argues that an employer cannot be found guilty of having violated its statutory bargaining duty where it is desirous of entering into a collective-bargaining agreement, where it has met and conferred with the bargaining representative on all required subjects of bargaining as prescribed by statute and has not taken unlawful unilateral action, and where it has not demanded the inclusion in the collective-bargaining contract of any illegal clauses or insisted to an impasse upon any nonmandatory bargaining provisions. Given compliance with the above, Respondent further argues that an employer's technique of bargaining is not subject to approval or disapproval by the Board.

Respondent reads the statutory requirements for bargaining collectively too narrowly. It is true that an employer does violate Section 8(a)(5) where it enters into bargaining negotiations with a desire not to reach an agreement with the union,[4] or has taken unilateral action with respect to a term or

[4] *N. L. R. B. v. Reed & Prince Manufacturing Co.*, 205 F. 2d 131, 134 (C. A.

condition of employment,[5] or has adamantly demanded the inclusion of illegal[6] or nonmandatory[7] clauses in the collective-bargaining contract. But, having refrained from any of the foregoing conduct, an employer may still have failed to discharge its statutory obligation to bargain in good faith. As the Supreme Court has said:[8]

> . . . the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, *or* which directly obstructs or inhibits the actual process of discussion, *or* which reflects a cast of mind against reaching agreement. (Emphasis supplied.)

Thus, a party who enters into bargaining negotiations with a "take-it-or-leave-it" attitude violates its duty to bargain although it goes through the forms of bargaining, does not insist on any illegal nonmandatory bargaining proposals, and wants to sign an agreement.[9] For good-faith bargaining means more than "going through the motions of negotiating."[10] ". . . the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . ."[11]

Good-faith bargaining thus involves both a procedure for meeting and negotiating, which may be called the externals of collective bargaining, and a bona fide intention, the

---

[5] *N. L. R. B. v. Katz*, 369 U. S. 736.

[6] *National Maritime Union*, 78 NLRB 971, 980, enf'd 175 F. 2d 686 (C. A. 2), cert. denied, 338 U. S. 954.

[7] *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349.

[8] *N. L. R. B. v. Katz, supra*, at 747.

[9] *N. L. R. B. v. Insurance Agents' International Union, AFL-CIO*, 361 U. S. 477, 487.

[10] *N. L. R. B. v. Truitt Mfg. Co.*, 351 U. S. 149, 155 (Frankfurter, J.).

[11] 1 N. L. R. B. Ann. Rep., 85, quoted with approval by the Supreme Court in *N. L. R. B. v. Insurance Agents' International Union, AFL-CIO, supra*, at 485.

presence or absence of which must be discerned from the record.[12] It requires recognition by both parties, not merely formal but real, that "collective bargaining" is a shared process in which each party, labor union and employer, has the right to play an active role.[13] On the part of the employer, it requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting bargaining

4

negotiations, and that it can no longer bargain directly or indirectly with the employees.[14] It is inconsistent with this obligation for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests.[15] As the Trial Examiner phrased it, the employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees.

---

[12] *Ibid.*; *N. L. R. B. v. Herman Sausage Co., Inc.*, 275 F. 2d 299, 231 (C. A. 5).

[13] "The basic concepts underlying the Labor Management Relations Act call for utilization of joint efforts at the bargaining table as a substitute for labor strife." *East Bay Union of Machinists Local 1304, U. S. W. v. N. L. R. B.*, 322 F. 2d 411, 415 (C. A. D. C.).

[14] ". . . the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." *N. L. R. B. v. Insurance Agents' International Union, AFL-CIO, supra*, at 484-485.

[15] *N. L. R. B. v. Herman Sausage Co., Inc., supra*, at 233; *N. L. R. B. v. Fitzgerald Mills*, 313 F. 2d 260, 268 (C. A. 2).

We do not rely solely on Respondent's campaign among its employees for our finding that it did not deal in good faith with the Union. Respondent's policy of disparaging the Union by means of the communications campaign as fully detailed in the Trial Examiner's Intermediate Report, was implemented and furthered by its conduct at the bargaining table. Thus, the negotiations themselves, although maintaining the form of "collective bargaining," fell short, in a realistic sense, of the concept of meaningful and fruitful "negotiation" envisaged by the Act. As the record in the case reflects, Respondent regards itself as a sort of administrative body which has the unilateral responsibility for determining wages and working conditions for employees, and it regards the union's role as merely that of a kind of advisor for an interested group—the employees. Thus, according to its professed philosophy of "bargaining," Respondent on the basis of its own research and evaluation of union demands, determines what is "right" for its employees, and then makes a "fair and firm offer" to the unions without holding anything back for later trading or compromising. It professes a willingness to make prompt adjustments in its offer, but only if new information or a change in facts indicates that its initial offer is no longer "right." It believes that if its

research has been done properly there will be no need to change its offer unless something entirely unforeseen has developed in the meantime. Simultaneously, Respondent emphasizes, especially to employees, that as a matter of policy it will not be

induced by a strike or a threat of a strike to make any change in its proposals which it believes to be "wrong." This "bargaining" approach undoubtedly eliminates the "ask-and-bid" or "auction" form of bargaining, but in the process devitalizes negotiations and collective bargaining and robs them of their commonly accepted meaning.[16] "Collective bargaining" as thus practiced is tantamount to mere formality and serves to transform the role of the statutory representative from a joint participant in the bargaining process to that of an advisor. In practical effect, Respondent's "bargaining" position is akin to that of a party who enters into negotiations "with a predetermined resolve not to budge from an initial position," an attitude inconsistent with good faith bargaining.[17] In fact Respondent here went even further. It consciously placed itself in a position where it could not give unfettered consideration to the merits of any proposals the Union might offer. Thus, Respondent pointed out to the Union, after Respondent's communications to the employees and its "fair and firm offer" to the Union, that "everything we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now."

In short, both major facets of Respondent's 1960 "bargaining" technique, its campaign among the employees and its conduct at the bargaining table, complementing each other, were calculated to disparage the Union and to impose without substantial alteration Respondent's "fair

[16] The term "bargain collectively" as used in the Act "has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346, quoted with approval in *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 408.

[17] *N. L. R. B. v. Truitt Mfg. Co.*, 351 U. S. 149, 154 (Frankfurter, J.).

and firm" proposal, rather than to satisfy the true standards of good-faith collective bargaining required by the statute. A course of conduct whose major purpose is so directed scarcely evinces a sincere desire to resolve differences and reach a common

6

ground. For the above reasons, as well as those elaborated at greater length by the Trial Examiner in his Intermediate Report, we adopt his conclusion that Respondent did not bargain in good faith with the Union, thereby violating Section 8(a)(5) and (1) of the Act.

Our concurring colleague, Member Jenkins, who joins us in finding certain conduct of the Respondent inconsistent with its bargaining obligation under the statute, misreads the majority opinion, and the Trial Examiner's Intermediate Report which we affirm, in asserting that our decision is not based on an assessment of Respondent's conduct, but only on its approach to or techniques in bargaining.

On the contrary our determination is based upon our review of the Respondent's entire course of conduct, its failure to furnish relevant information, its attempts to deal separately with locals and to bypass the national bargaining representative, the manner of its presentation of the accident insurance proposal, the disparagement of the Union as bargaining representative by the communication program, its conduct of the negotiations themselves, and its attitude or approach as revealed by all these factors.

Nothing in our decision bans fact-gathering or any specific methods of formulating proposals. We prescribe

no time-table for negotiators. We lay down no rules as to any required substance or content of agreements. Our decision rests rather upon a consideration of the totality of Respondent's conduct.

In one central point of our colleague's comment, with all respect we believe he is in error. His strictures in relation to our interpretation of the law's restraints on "take-it-or-leave-it" bargaining were decisively answered by the Supreme Court in its review of the nature of the bargaining obligation in *Insurance Agents*:[18]

> . . . the legislative history (of Taft-Hartley) makes it plain that Congress was wary of the position of some unions, and wanted to ensure that they would approach the bargaining table with the same attitude of willingness to reach an agreement as had been enjoined on management earlier. It intended to prevent employee representatives from putting forth the same "take it or leave it" attitude that had been condemned in management.

And in Justice Frankfurter's opinion in *Truitt*[19] upon which our colleague relies, the Justice also wrote:

> . . . it (good faith) is inconsistent with a predetermined resolve not to budge from an initial position.

While we share his objective and that of our dissenting colleague of encouraging a maximum of freedom and experimentation in collective bargaining, when questions are

[18] *N. L. R. B. v. Insurance Agents' International Union, AFL-CIO, supra,* at 487.

[19] *N. L. R. B. v. Truitt Mfg. Co., supra,* at 154.

raised under the law as construed by the courts and the Board concerning the conformity of a specific respondent's course of conduct with the requirements of the law, the Board must apply the law to the totality of that conduct in the interest of preserving and fostering collective bargaining itself. That is what we have sought to do here.

THE REMEDY

We have carefully considered the various exceptions to the Trial Examiner's Recommended Order which were filed by each of the parties. As we think his Recommended Order is appropriately tailored to the violations found and will effectuate the purposes of the Act, we overrule all these exceptions.

8

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order the Order recommended by the Trial Examiner and orders that Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[20]

Dated, Washington, D. C., December 16, 1964.

FRANK W. McCULLOCH, *Chairman,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

[20] The Board includes as part of its Order the "Armed Forces" provision now appearing in the Notice to All Employees attached as Appendix B to the Trial Examiner's Intermediate Report.

Member Jenkins, concurring:

The fundamental issues in this case have been obscured by slogans and shibboleths which have understandably led my colleagues into deciding issues which in my judgmment are not presented for decision. Moreover, the Board has undertaken to describe the statutory obligation to bargain in good faith by utilizing conclusionary comments which may be justified by the facts in this case but which have such far-reaching implications as to warrant the expression of my individual views designed to limit the reach of this decision.

Stripped of verbiage this case presents the fundamental issue of whether the course of conduct engaged in by the employer during the 1960 contract negotiations which led to an unsuccessful 3 weeks strike, fell below the standard of good-faith bargaining required by Section 8(a)(5) of the Act. Certain specific conduct was alleged as the basis for finding that the Respondent's conduct violated 8(a)(5) and (1) of the Act. This Board has repeatedly held that conduct designed to undermine the Union, or to demonstrate to employees the futility of engaging in collective bargaining through a union, fails to meet the standard of good-faith bargaining. If my colleagues had been content to thus ground their finding in the instant case, I would have no reason to disagree. The record clearly supports their findings with respect to (a) the failure of Respondent to furnish certain information requested by the Union during contract negotiations, (b) the attempts to deal separately with locals on matters which were properly the subject of national negotiations, and (c) the Respondent's importuning of locals to abandon or refrain from support-

ing the strike authorized by the collective-bargaining representative. I share Member Fanning's view that Respondent's presentation of its personal accident

10

insurance proposal to the Union on a take-it-or-leave-it basis was not violative of Section 8(a)(5). Within the context of the facts of this case, were the Board to conclude that the foregoing derelictions justify a broad remedial order, I would be able to join and find no fault with the disposition of the case. However, in view of the fact that the majority has gone beyond conduct and indeed concedes that it is not basing its finding of overall bad faith on conduct but rather is basing that finding on an assessment of the Respondent's approach to its duty to bargain in good faith, I am constrained to disavow their comments concerning the employer's bargaining technique.

In effect I read the majority opinion to hold that the Act so regulates a party's choice of techniques in collective bargaining as to make unlawful an advance decision, and a frank communication of that decision, concerning the position from which a party is unwilling to retreat. The majority would apparently find that it is unlawful for a union to present a contract proposal on a take-it-or-leave-it basis since I assume the majority would not apply different standards to unions than to employers. The bargaining technique often employed by unions in support of "area standards" contracts is not significantly different from the technique described as the "firm fair offer" by an employer. I would not find a lack of good-faith bargaining where

either the employer or the union entered the negotiations with a fixed position from which it proposed not to retreat, engaged in hard bargaining to maintain or protect such position, and made no concessions from that position as a result of bargaining. As one member of the Supreme Court has pointed out, good faith is not necessarily incompatible wtih stubbornness or even with what to an outsider may seem unreasonableness.[21]

11

The majority states frankly that the holding of a predetermined resolve not to budge from an initial position is incompatible with good-faith bargaining. That statement seems to ignore the language in Section 8(d) of the Act which makes it clear in unequivocal words that "such obligation does not compel either party to agree to a proposal or require the making of a concession." The opinion of my colleagues fails to distinguish between two important concepts, *viz.*, the formulation of a settlement position and the techniques employed in reaching a settlement. The Act does not dictate the methods which a party may choose to utilize in formulating its bargaining position. Indeed, many unions and employers use surveys of one sort or another as a fact-gathering device in advance of bargaining. Moreover, both employers and unions are free from statutory regulation under this Act in formulating the kind of proposal or counter proposal which each will communicate to the other. I know of no decision of this Board which has sought to interpret the statute as requiring either unions or employers to follow a prescribed timetable in

[21] *N. L. R. B. v. Truitt Manufacturing Co.*, 351 U. S. 149, 154-155 (Frankfurter, J.).

communicating the various shifts in position which seem desirable as a matter of self interest. Thus, if either an employer or a union for reasons dictated by self interest chooses to include in a proposal trading items which it is willing later to withdraw or conversely chooses to limit its proposal to items which it will never withdraw voluntarily, the choice is its and not the Board's.

To describe the foregoing in shorthand by evocative terms provides little guidance for either unions or employers. To condemn bargaining techniques as unlawful because of the utilization of what the majority describes as "take it or leave it" is to obfuscate the issue. Basically it is our purpose to examine industrial relations against the realities that exist. It is not our function to require the adoption of a particular

12

technique or to condemn the use of a given technique as such. Under circumstances where the overall conduct is designed to destroy the bargaining relationship or to undermine the status of a bargaining representative, it is clear that good-faith bargaining has not occurred. This, however, does not flow from the adoption of a technique or from an effort to gain the supposed advantage of winning acceptance of one's own proposal. There is adequate evidence in this record to support a finding that the Respondent by its course of conduct sought to bypass the Union and deal directly with the employees, to discredit the collective-bargaining representative with which it was obligated to deal and carry on negotiations with others.

Some portions of my colleagues' opinion may be read as holding that the Act was violated because Respondent chose to decide in advance on the proposal which it was willing to make and from which it was unwilling to retreat unless forced to do so by economic pressure which it apparently regarded as a calculated risk. If such an inference be drawn I disavow it. If free collective bargaining is to survive, both employers and unions must remain free of governmental interference with their right to formulate independently the economic positions which each desires to take and to decide without governmental compulsion whether that position shall be conveyed to the other party at the outset, at some mid point, or at the conclusion of negotiations. To do otherwise maximizes governmental construction of the bargain and minimizes the free flow of independent economic judgment essential to a strong, independent trade union movement and a strong, independent entrepreneurial system, both of which are vital to the kind of economy envisaged by the Act which we administer.

Dated, Washington, D. C., Dec. 16, 1964.

HOWARD JENKINS, JR., *Member,*

NATIONAL LABOR RELATIONS BOARD.

13

Member Leedom, dissenting in part:

My colleagues have found that the Respondent failed to bargain in good faith with the Union in the 1960 negotiations, both in certain specific respects and generally. Although I agree with the specific violations found, I cannot

justify the bad-faith finding with respect to the Respondent's overall bargaining conduct.

On the issue as to Respondent's overall good or bad faith it should be conceded that there are various approaches to, and tactics in, negotiations that are wholly consistent with the bargaining obligation imposed by the Act; and it seems to me that both management and labor should not be discouraged from seeking new techniques in dealing with the constantly evolving problems with which they are faced across the bargaining table. Consequently we should take care not to create the impression that we view with suspicion novel approaches to, and techniques of, collective-bargaining. This is not an area of sharp disagreement at this Board. Rather it is a question of emphasis: Should the parties be given a wide latitude in devising their bargaining methods, or should there be careful intervention by a regulator? At this time when not only the industrial community, but some labor spokesmen as well are urging less government intervention in industrial relations, it seems to me the emphasis should be on freedom of action in the bargaining process. Very respectible authority seems to agree: "The law of collective bargaining will have little value to the community if the process of logical deduction from prior decisions results in wide divergence between the administrative and judicial rules and the needs of both management and labor."[22]

Notwithstanding the foregoing, I cannot fully accept Respondent's view of the breadth of the bargaining obligation imposed by the Act, nor the limitation it believes the

[22] *Cox and Dunlop, Regulation of Collective Bargaining*, 63 Harvard Law Review, 389, at 405.

law places on those matters which can properly be considered where good or bad faith bargaining is in issue. In both regards

14

its construction seems too rigid. I nevertheless believe that both the law and good policy require that this Board not be hypercritical of what goes on at the bargaining table or in a developing situation. In order for collective bargaining to be free and to succeed, the parties themselves must with a minimum of exceptions have the right to resort to such tactics, and to take such positions, as they believe necessary or desirable in dealing with the matters before them. If at each step they must consider the effect of their specific words, actions, and proposals upon some distant tribunal unacquainted with the particular problems in dispute, and with that more subtle distinction, the personalities of the negotiators themselves, they surely lose the flexibility and spontaniety necessary for free, effective bargaining. Thus they are deprived of their right to determine, free of governmental intervention, the substantive terms of their agreement, should one be reached.

No matter how much we may disclaim any intent to compel bargaining to proceed in some set form, the fact that we closely scrutinize what goes on at the bargaining table will necessarily have the effect of directing bargaining into channels which we have in the past approved, for in such channels will lie security in bargaining, if not success.[23]

[23] The majority cites the Supreme Court to the effect that to bargain collectively as used in the Act "has been considered to absorb and give statutory

(Footnote continued on following page)

Whether the substitution of our judgment as to the proper forms and content of bargaining be made directly or indirectly is a difference of no consequence insofar as it interferes with free bargaining and tends to discourage innovation both in tactics and proposals which, as I believe, could be of benefit not only to the parties but to the public as well.[24] Consequently, good policy

15

suggests that we leave the parties to their own devices at the bargaining table unless some compelling facts force us into the area of bargaining. As the Supreme Court stated in the *Oliver* case, "The purposes of the Act [Wagner and Taft-Hartley Act] are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves."[25]

The principal facts are not disputed. Concededly the Respondent did not intend to rid itself of the Union during the 1960 negotiations. Rather it approached the bargaining table fully intending to reach an agreement with the

(Footnote continued from preceding page)

approval to the philosophy of bargaining as worked out in the labor movement in the United States." See footnote 16, *supra*. With this statement I certainly agree and, in fact, am arguing here that this process of working out be permitted to continue with a flexibility capable of meeting new problems as they arise. But if only standards of conduct approved in the past are to have Board approval now and in the future, as seems to be the majority's position, then change will be difficult if not impossible, and industry and labor will be saddled with archaic rules and procedures for their conduct in negotiations.

[24] See, *N. L. R. B. v. Insurance Agents' International*, 361 U. S. 477, 495, where the Court in considering the issue of good faith stated that it "failed to see the relevance whether the practice in question was time honored or whether its exercise is generally supported by public opinion." Further, as the Court points out in its decision at p. 490, Board regulation of tactics in support of negotiations necessarily implies some control over the substantive terms of agreement.

[25] *Local 24 of I. B. of T. C. W. & H. v. Oliver*, 538 U. S. 384, 295 (1959).

Union and to this end engaged in many bargaining sessions running from mid-summer to the late fall of 1960. And the end result was in fact a comprehensive agreement. To be sure, the Respondent in presenting its offer on August 31 took a firm position but that does not in itself demonstrate bad faith.[26] In fact, the Respondent's initial attitude with respect to its offer does not appear to have been appreciably, if any, more intransigent than that of union presenting its proposed changes. However, I find it hard to measure degrees of intransigence and have considerable doubts that balancing it out is of real significance; for whatever may have been the situation at early stages of negotiations, it is clear that as negotiations proceeded the Union backed down considerably and the company acquiesed in a number of changes from its original proposals. Even though the Respondent's changes may not have been all that the Trial Examiner and majority may have wished, I fail to see how their alleged "inconsequential" nature is some evidence of bad faith when Respondent was not obligated to propose or agree to any change at all in its initial offer.

The majority and the Trial Examiner advert to statements by the Respondent and its representatives both at the bargaining table and in employee communications which were highly critical of the Union and its president and some also suggesting an approach to bargaining not wholly in keeping with its statutory responsibilities. But against the background of continuing negotiations and the Union's equally inflammatory publications and comments, and its

[26] *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 404 (1952). *N. L. R. B. v. Fitzgerald Mills Corporation*, 313 F. 2d 260 (C. A. 2, 1963).

statements of "must" demands, the Respondent's role in this battle of

16

words seems to me to lose some of its evidentiary significance. Consequently, I question whether this cause of collective bargaining is aided by the Board's taking particular comments and evaluating them in a dispassionate context so extremely different from that of which they were a part. It is too easy through such an approach to find unlawful that which is perhaps at worst only undesirable.

I do not mean to suggest that the issue of good or bad faith has any clear cut answer here. My position is not dictated so much by strong conviction as by uncertainty. I am not persuaded by the reasons that the majority state for their finding of bad-faith bargaining; and the finding itself and the supporting rationale leave me in the dark as to their practical efficacy. But I am particularly disturbed by the treatment accorded Respondent's communications. Surely the Respondent can lawfully communicate with its employees. Yet here, although the communications are held to be some evidence of bad faith, the majority neither in its decision nor in adopting the Trial Examiner's Recommended Order provides the Respondent with any guides by which it can with reasonable certainty determine what it can lawfully say to its employees. In areas such as this bordering on Section 8(c) of the Act and free speech, I believe that the Respondent is entitled to something more by way of clarification than the vague proscription implied in the general bargaining order. But I doubt if the facts and findings indicate what specific limitations

can properly be laid down. In any event, the situation with respect to the bad-faith finding is at best ambiguous, and I would, therefore, find that the General Counsel has failed to prove by a preponderance of the evidence that the Respondent did not bargain in good faith during the 1960 negotiations with the Union.

Dated, Washington, D. C., Dec. 16, 1964.

BOYD LEEDOM, *Member,*

NATIONAL LABOR RELATIONS BOARD.

Table of Contents of Intermediate Report.

The original pagination of the Trial Examiner's Intermediate Report is indicated not only in the top righthand corner on each page, but also by a space of several lines in the text and the insertion of the original page number therein. The numbers marking the lines on each page of the original report have been inserted in brackets at the appropriate places in the printed text.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D. C.

GENERAL ELECTRIC COMPANY,
and
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO.

Cases Nos. 2-CA-7581-1
7581-2
7581-4
7864 (Post 10-CA-4682)

Table of Contents of Intermediate Report.

Statement of the Case 1
Findings of Fact 2

Table of Contents of Intermediate Report.

I. The business of the Company 2
II. The labor organizations involved 2
III. The unfair labor practices 2
A. The issues presented by the pleadings 2
B. As to IUE's status as bargaining representative 3
C. Background of 1960 negotiations 6
1. GE's general approach to collective bargaining 6
2. Preparations for 1960 negotiations 9
3. Prenegotiation meetings 13
D. GE's refusal to bargain on June 13, 1960 with respect to its personal accident insurance proposal 14
E. Presentation of IUE's contract proposals to GE on June 13, 1960, and GE's communications to employees with reference thereto in advance of bargaining 16
F. The 1960 negotiations as a whole 18
1. Arrangements for negotiations 18
2. Chronology of more significant dates and events 19
3. Employee communication during the period of negotiations—in general 20
G. The early meetings on the subject of employment security—July 19 to August 11 .. 23
H. Meetings on Union's general demands, prior to submission of GE offer, August 16 to 25 .. 28
I. August 29 and 30: GE presents its offer to the Union 29
J. GE presents its offer directly to employees 32

Table of Contents of Intermediate Report.

K. Negotiating meetings August 30 through September 8 36
L. The revision of GE's offer to include holiday-vacation options 39
M. The resolution at the IUE convention for a September 25 vote on the recommendations of the negotiating committee 41
N. GE's reaction to the Union's call for a vote 41
1. Introduction 41
2. GE attempts to induce Local officials and employees to alter the time and place of voting and the question to be voted on .. 42
3. GE announces to employees that its offer is now final and reiterates its policy not to make concessions because of a strike or threat of strike 43
4. GE intensifies its attack upon the motives of IUE's leadership 44
5. GE makes its offer effective for non-represented employees 45
6. GE in its communications emphasizes danger to employee job security if its offer were enlarged or if a strike ensued 47
O. Negotiating meetings between September 20 and October 1 50
P. Alleged local bargaining; other events during the strike 58
1. Offer at Schenectady and Pittsfield of more favorable truce terms than those theretofore offered the Union 58
2. Direct dealings with other IUE locals regarding truce terms 59

Table of Contents of Intermediate Report.

3. Employee communications 61
Q. Negotiating meetings October 4 to October 19 63
R. The strike settlement meetings on October 21 and 22 65
S. Postsettlement meetings 67
T. Alleged threat and discrimination at Augusta, Georgia 70
U. The alleged independent violations of Section 8(a)(5) and (1) 70
1. Preliminary statement 70
2. Refusal to furnish information 71
a. The specific allegations of the complaint 71
b. The applicable facts 71
c. Consideration of Respondent's defenses and concluding findings 76
3. Local bargaining 79
V. Analysis and concluding findings as to the alleged overall bad-faith bargaining 85
W. The strike as an unfair labor practice strike 106
X. The discriminatory refusal to reinstate strikers 107
IV. The effect of the unfair labor practices upon commerce 107
V. The remedy 108
Conclusions of Law 109
Recommended Order 109
Appendix A
Appendix B

C-26

Intermediate Report.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D. C.

GENERAL ELECTRIC COMPANY,
and
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO.

Cases Nos. 2-CA-7581-1
7581-2
7581-4
7864 (Post 10-CA-4682).

Harold L. Richman, Esq., Alan H. Randall, Esq., and Joseph S. Rosenthal, Esq., for the General Counsel.

David L. Benetar, Esq., Sanford Browde, Esq., and Robert C. Isaacs, Esq. (Nordlinger, Riegelman, Benetar & Charney) and Thomas F. Hilbert, Jr., Esq., all of New York, N. Y., for the Respondent.

Benjamin C. Sigal, Esq., David S. Davidson, Esq., and Winn Newman, Esq., of Washington, D. C., for the Charging Party.

Before: Arthur Leff, *Trial Examiner.*

Intermediate Report.

STATEMENT OF THE CASE

Charges were filed on September 21, 1960, October 4, 1960, October 14, 1960, and March 16, 1961, by the Union above named, herein called IUE or the Union, against the Company above named, herein variously called GE, the Company, or the Respondent. Based on such charges, the General Counsel, on April 12, 1961, issued an amended consolidated complaint (thereafter further amended) alleging that the Respondent in respects more fully to be set out below had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. The Respondent filed an answer in which it denied generally the commission of the alleged unfair labor practices, and also pleaded a number of affirmative defenses, some of which were later stricken at the hearing on motion of the General Counsel and the Union. A pretrial conference was conducted on May 31, 1961, and thereafter a hearing was held before Arthur Leff, the undersigned duly designated Trial Examiner, at New York City on some 79 separate hearing dates beginning July 24, 1961. The record was closed for the taking of evidence on February 15, 1962, but the hearing was continued *sine die* for oral argument. Briefs were filed by all parties on July 26, 1962, and reply briefs on November 1, 1962. Oral argument was held on January 28 and 29, 1963. The hearing was closed on January 29, 1963.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Company

[5] General Electric Company, a New York corporation with its principal office at New York City, is engaged in the manufacture, sale, and distribution of electrical motors, appliances and equipment, as well as numerous other products. The Company has plants in 29 States and, in addition, some 400 service installations or other places of business [10] located in all 50 States. The Respondent is engaged in commerce within the meaning of Section 2(6) of the Act.

II. The Labor Organizations Involved

[15] International Union of Electrical, Radio and Machine Workers, AFL-CIO, and its constituent locals referred to in the complaint are labor organizations within the meaning of Section 2(5) of the Act.

[20]

III. The Unfair Labor Practices

A. *The issues presented by the pleadings*

This case arises out of the 1960 national contract negotiations between the IUE and GE. The negotiations led to an unsuccessful 3-week [25] strike, alleged in the complaint to have been an unfair labor practice strike, before the IUE finally capitulated to GE's prestrike contract terms. The complaint basically alleges that the Respondent during the course of the negotiations failed and re-

fused to bargain in good faith with the Union and engaged in related conduct in derogation of the Union's [30] status as bargaining agent, all in violation of Section 8(a)(5) and (1) of the Act. As a subordinate issue, the complaint also alleges a violation of Section 8(a)(1) and (3) based upon an alleged threat to discharge striking employees at the Respondent's Augusta, Georgia, plant and upon the Respondent's failure and refusal to reinstate 20 named employees at [35] that plant who had been replaced during the course of the strike. As to the 8(a)(3) issue, however, all parties are agreed that a finding of unlawful discrimination must stand or fall on the disposition to be made of the complaint's allegation that the strike was caused or prolonged by the Respondent's refusal to bargain.

[40] With respect to the key 8(a)(5) and (1) issue, the complaint as last amended prior to the hearing includes the broad allegation that at all times since June 13, 1960, the date the Union first submitted its contract proposals, Respondent negotiated with the Union in bad faith. [45] As the General Counsel made clear at the prehearing conference, and as his voluminous bill of particulars several times supplemented reflects, the intent of the pleading is to place in issue the Respondent's overall course of conduct, both at and away from the bargaining table, insofar as it bears on the Respondent's bargaining frame of mind during the entire period [50] of negotiations. Without limiting the generality of the foregoing broad allegation, the complaint also contains a number of more specific allegations. Thus, it alleges in substance that on or about August 30, 1960, the Respondent adopted and thereafter maintained what was in effect a "take-it-or-leave-it" posi-

tion with respect to a counteroffer the Respondent had submitted that [55] day. The complaint also alleges that "in order to undermine the Union" and "in derogation of the status of the Union as bargaining agent," the Respondent by means of communications and other appeals directed to employees in the bargaining units (a) engaged in a campaign throughout the period of negotiations to discredit and impugn the motives and abilities of the [60] Union's leadership; (b) attempted through direct contact with employees to induce employee acceptance of the Respondent's August 30 counteroffer; and

3

(c) attempted during the latter part of September to induce employees to depart from the Union-prescribed method for conducting a scheduled vote on the Respondent's counteroffer. The complaint further alleges that during October 1960, while national negotiations with the Union were being [5] conducted, the Respondent attempted—further in derogation of the Union's status as national bargaining agent—to bargain directly with employees and/or their local representatives at certain of its plants, and offered at some of them terms and conditions of employment more favorable than those it had theretofore offered the Union in national negotiations. [10] Finally, the complaint alleges that the Respondent failed and refused timely to furnish the Union with certain relevant data the Union had requested in connection with the bargaining. The alleged attempts to bargain directly with employees and the alleged refusal to supply requested information are relied upon by the General Counsel both

as providing [15] additional evidence of bad faith bargaining and as constituting independent violations of Section 8(a)(5) and (1).

B. *As to IUE's status as bargaining representative*

[20] GE employs approximately 250,000 employees, of whom about 120,000 are in organized bargaining units. The IUE is by far the largest union in terms of employees represented. It represents some 70,000 employees under Board certifications issued to it and to its constituent locals. The [25] United Electrical Workers Union ("UE") —from which the IUE stemmed as a result of schismatic action following the ouster of the UE from the CIO for alleged Communist domination in about 1950—is the union next in size. The UE represents either directly or through constituent locals some 10,000 GE employees. The balance of the represented employes are divided [30] among some 100-odd other unions with which GE is under contract.[1]

As a result of separate certifications issued in Board representation proceedings from time to time since 1950, the IUE-represented employees are formally grouped in more than 105 appropriate bargaining units, [35] almost all of which are immediately involved in this proceeding. Appendix A of the complaint as amended at the hearing (General Counsel's Exhibit No. 5), which is incorporated herein by reference, contains a general description of each

[1] Where a certified bargaining agent does not participate in national bargaining with GE—as only the IUE, the UE, and the Pattern Makers do—it is counted here as a separate union for each unit it represents. [60] This is so even though the same union or another local affiliated with the same international may be the certified representative of GE employees at another location or in a separate bargaining unit at the same location.

such unit, the name of the certified union (IUE or one of its locals), the date of certification, and the case number of the Board's [40] representation proceeding in which the certification was issued. As appears from the Appendix, the IUE itself is certified as the representative in 43 of the units and various constituent IUE locals in the others. The record reflects that even in those instances where the IUE itself is certified, the IUE has a local union which represents the employees on a [45] local level and which, vis-a-vis GE as well as its parent International, functions in substantially the same manner as do the locals directly certified.

Notwithstanding the separate unit certifications, the IUE and GE, [50] by mutual acquiescence, have historically engaged in bargaining on a national or multiunit basis, at least with respect to the negotiation of their basic agreements. This pattern of bargaining, which had theretofore prevailed in the relationship between the UE and GE, and which is still [55] conformed to in GE's dealings with the remnants of UE, was adopted in 1950

4

when the IUE first appeared on the GE scene, and has consistently been followed since. The first national or multiunit collective bargaining agreement was entered into between the IUE and GE in September 1950, and was followed by renewal agreements in 1951, in 1952, in 1954 and in 1955. [5] The agreements recited in their preamble that they were

> entered into . . . by and between [GE] and [IUE], acting for itself and in behalf of each of the below-

listed IUE (Cio) Locals currently certified as collective [10] bargaining representatives of Company employees and such other IUE (Cio) Locals as may hereafter be certified as collective bargaining representatives of Company employees.

[15] The agreements also contained the following union recognition clause:

> The Company agrees to recognize the Union on behalf of and in conjunction with its Locals for those bargaining units of Company employees for which the Union or any of its locals, through [NLRB] certifications, is designated, [20] as the exclusive collective bargaining representative within such units . . .

The 1960 agreement, entered into following the strike, was similarly executed by the IUE on behalf of itself and listed Locals (along with such [25] additional Locals as might thereafter be certified). It contained a recognition recital identical to the one in the earlier agreements.

Every agreement between the IUE and GE has, with a few insignificant exceptions, covered every GE bargaining unit for which the IUE or an [30] affiliate had been certified by the Board. The only exceptions have been a few small units for which the IUE had obtained representation rights at a time when the particular plants involved were not integrated in the GE corporate structure, but subsequently became part thereof, and where special situations existed which necessitated special treatment. The [35] total number of such excluded units in 1960 was 8 and the total number of employees in those units was 118.

In actual practice, the negotiation of the national agreements between the IUE and GE has been conducted on

behalf of the IUE and the [40] certified locals by the IUE's General Electric Conference Board, acting as their duly designated bargaining agent. The IUE-GE Conference Board is a constitutional body of the Union. It is composed of elected delegates from all IUE local unions representing GE employees.[2] The Conference Board designates from among its delegates the negotiating committee that [45] directly participates in the contract negotiations. Under the Union's constitution, the Conference Board is authorized to determine contract proposals, to call strikes, and to approve and conclude agreements, and any such action voted by it is made binding upon all locals, regardless of [50] their individual consent.

The Respondent in its dealings with the IUE since 1950 has recognized and acquiesced in the Conference Board's status in national bargaining as the authorized bargaining agent of all locals represented on that body and has expressly acknowledged the Conference Board's [55] constitutional authority to undertake effective action binding on all such locals with respect to matters committed to national contract

5

negotiations. As to such matters, GE for all practical purposes has dealt with the IUE through its GE Conference Board as a *de facto* accredited bargaining representative of all IUE represented employees in a single [5] overall bargaining unit.

---

[2] Each local is entitled to 1 delegate for each 1,000 members or [60] part thereof, and 1 additional delegate for each additional 1,000, but not more than 4 in all. The president of the IUE is an *ex-officio* member of the Board and all its committees.

Intermediate Report.

The national agreements made between the IUE and GE since 1950 have included comprehensive provisions applicable on a chainwide basis relating to regulation of wage rates, hours, and terms and conditions of employment. Thus, for example, such subjects as overall wage increases, [10] automatic in-grade wage progression, cost of living adjustments, vacations, holidays, overtime provisions, insurance and pension benefits,[3] termination pay on plant closings and dues checkoff arrangements have been covered by such agreements. The agreements have not been all-embracing, however, and have reserved certain subjects for negotiation on a local level. Since 1950, [15] the only contract negotiations the Company has conducted with any IUE locals covered by the national agreements have been for supplements to the national agreements covering matters such as local seniority, layoffs and recall, and inequity wage adjustments. The IUE also retains an important representative status in the administration of the national agreements. [20] Under the grievance and arbitration procedure set out in the national agreements, the Locals handle their grievances through the first two steps of the three-step grievance procedure, but at the third ("headquarters") step, the grievance is "referred to the National Officers of the Union for submission to an Executive Officer of the Company or his designated [25] representative." The IUE alone has the authority and responsibility to administer the arbitration procedure.

When, as will be seen, the Company went into the 1960 negotiations, it gave no indication of any desire to depart from the national method of [30] bargaining as historical-

[3] Insurance and pensions are covered by separate national agreements simultaneously executed.

ly developed with the acquiescence of all concerned. For the purpose of determining the Respondent's bargaining obligations in this case, it is unnecessary to disturb the Board's appropriate unit findings as heretofore made. As was stated in *Radio Corporation of America,* 135 NLRB No. 100, "the Board is not such a prisoner of a narrow interpretation of [35] its own findings concerning appropriateness of a separate bargaining unit that it cannot recognize a workable pattern of bargaining developed by the parties which . . . seeks to accommodate the interests of local and national bargaining." Here the parties have developed such a pattern which in the particular circumstances of this case I find to be entirely [40] consistent with the spirit of the Act. As to matters historically delegated to national negotiations, the Respondent has recognized the IUE, through its Conference Board, as the actual bargaining agent for all employees in the aggregate of units represented by delegates to the Conference Board. Having accorded such recognition to the IUE and having entered into the [45] 1960 national negotiations on that basis, the Respondent is in no position in this proceeding to question the representative status of the IUE, and, within the area of such negotiations must be held to the same standards of good faith bargaining as would have prevailed had a finding been made in this case that the collective units comprised a single appropriate bargaining [50] unit with the IUE as its exclusive representative.[4]

[4] In order to find that a unit is *a* unit appropriate for the purpose of [55] collective bargaining, it is unnecessary to decide that it is the only appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 478; *A. S. Beck Shoe Corp.*, 92 NLRB 1457, 1458-1459; *Safeway Stores, Inc.*, 110 NLRB 1718, 1731-1732. There is Board authority for finding that a grouping comparable to that represented by the IUE in the instant case [60] constitutes *a* unit appropriate for the purposes of collective bargaining. *General Motors Corp.*, 120 NLRB 1215.

C. *Background of 1960 negotiations*

1. GE's general approach to collective bargaining

[5] As will later more fully appear, many of the specific events relating to the 1960 negotiations can be seen in true focus only if considered against the backdrop of GE's underlying policies relating to collective bargaining. It is therefore appropriate to examine such [10] policies before undertaking a review of GE's specific conduct which is here under attack.

GE's present approach to employee and union relations was first conceived in 1947 and developed largely under the guidance of Lemuel R. [15] Boulware, then and for many years later GE's Vice-President-Relations-Service.[5] The approach has often been referred to as "Boulwareism," although GE itself abjures use of that term, claiming it has been misconstrued by outsiders to reflect a concept not actually GE's. It came into being as an aftermath of a lengthy companywide strike which the UE [20] had conducted against GE in 1946. That strike was settled only after GE raised its wage offer from a prestrike 10 cents an hour to a poststrike 18½ cents an hour. As appears from one Company report, GE's management regarded UE's "highly successful strike" as "little short of a debacle." Management had theretofore had a "feeling" of "security in the knowledge [25] that the Company had been a good employer [which] had treated employees

[5] During the 1960 negotiations Boulware no longer occupied that position having been succeeded by Jack S. Parker, but still participated in a consultant capacity in some of management's deliberations relating to [60] such negotiations.

fairly, and had pioneered in the voluntary installation of many employee benefit programs." Nevertheless, the strike had been "broadly supported" by employees. The realization that its earlier feeling of security had [30] been a false one was a "somber event" for GE management.

The jolt of the 1946 strike led GE management to take a new look. GE sought to determine why it had failed (as it saw it) to achieve the same high degree of success and effectiveness in its employee relations as it had in other areas of its operations, such as, for example, in [35] product development and marketing. Management concluded, *inter alia*, that to gain employee job satisfaction, loyalty and support, it was not enough that the Company be a good employer. It was equally if not more important that the Company be *known* to its employees as a good employer. With regard to employee pay, benefits and other terms and conditions of employ- [40] ment, as well as other elements entering into employee job satisfaction, the employees must be made to understand that it was the Company's aim "to do right voluntarily" and to allow its employees all that was fairly warranted, bearing in mind the "balanced best interests" of employees and all others having a stake in the Company's enterprise. Moreover, the [45] employees must also be made to understand that, just as there was no need to drag reluctantly from the Company all that was fairly coming to them, so, too, there could be no profit in a show of force by a labor organization designed to extract more for the employees than the facts—as management evaluated them—justly warranted. This involved essentially a selling [50] problem, or, as the Company termed it, one of "job marketing." If the

Company was to achieve ultimately the same success in job marketing that it had accomplished in its highly successful product marketing, it must assimilate to the latter what it had learned in the former about sound [55] product planning and research, market development and merchandising.

7

Application of this program necessitated a revision of the Company's approach to collective bargaining. The Company had theretofore engaged in the traditional type of bargaining, under which a union initially asks more than it expects to get and an employer offers less [5] than it expects to give, and, through the process of compromise and give-and-take, both sides, if bargaining is successful, eventually arrive at a mutually acceptable middle ground. But that type of bargaining had to go if the Company was to establish its credibility with employees that it was putting into effect *voluntarily* and without need of outside pressures [10] all that was warranted in the way of wage and benefit improvements.

Under GE's present approach to bargaining, as GE states it, the Company itself seeks through extensive year-round research into all pertinent facts to determine what is "right" for employees. Its research [15] includes not only a study of business conditions, competitive factors, economic trends and the like, but the gathering of its own information as to employee needs and desires through independent employee attitude surveys, comments made by employees at informative meetings, direct discussions by supervisors with employees and statements in union [20]

publications. When bargaining begins, the Company, as part of its overall research, listens to the presentations made by all the unions with which it deals, and evaluates the unions' demands with the help of all the facts it has on hand, including those supplied by the unions.

[25] On the basis of its study so made, GE makes its own determination if what is "right." GE then makes an offer which—as it declares to the unions and to its employees—includes *everything* it has found to be warranted, without anything held back for later trading or compromising. GE makes precisely the same basic offer to substantially all unions with [30] which it is engaged in negotiations. Contrary to the assertion of the General Counsel, GE does not initially present its offer on an avowed "take-it-or-leave-it" basis. It professes a willingness to make prompt adjustments in its offer whenever (but only when) new information from any source or a significant change in facts indicates that its initial offer [35] fell short of being right.[6] But GE believes—or at least so declares—that if it has done its preliminary research into the facts accurately, no substantial reason for changing its offer should ever exist, save in the event of some new unforeseen development having an impact on the economy as a whole. And GE repeatedly emphasizes, especially to employees, [40] that as a matter of policy it will not make any change it believes to be incorrect because of a strike or threat of

[6] GE contends that practically every offer it has made in the past [55] 10 years has been altered in one way or another after discussions with the unions involved. But this is disputed by the General Counsel who asserts that once GE has formally presented its offer it will only consider insubstantial changes save in extraordinary situations such as the one referred to in footnote 8, below. The nature of the [60] changes made prior to 1960 was not fully explored at the hearing and cannot be here evaluated. The 1960 changes will be considered in a later section of this report.

strike and that it will "take" a strike of any duration to resist doing what it considers to be "wrong."

The Respondent extols its "fair and firm offer" approach as a [45] straightforward one that removes doubt from employees' minds as to precisely where it stands. It disparagingly refers to the "ask-and-bid" or "auction" form of bargaining as a "flea bitten eastern type of cunning and dishonest but pointless haggling." Such bargaining, according to the Respondent's articulation, allows a union to *appear* to get more than an employer is [50] willing to give, though that is often not the case, and this only serves, it says, to mislead employees into believing that union officials are useful

8

in ways they are not, thus falsely enhancing the union's prestige while diminishing that of the employer and encouraging employee support of union shows of strength. The Respondent's approach on the other hand, it says, makes it obvious to employees that the Company "is not being [5] forced to be fair by the belligerent action of a labor union."

All that has been said above is tied to what clearly appears to be the keystone of Respondent's bargaining philosophy—the marketing of management positions directly to employees so that the employees in [10] turn may influence union acceptance. It is a stated policy of the Company to achieve maximum involvement and participation of employees in decisions affecting its business, including specifically though not limited to decisions relating to collective bargaining; to minimize opposition to steps management

takes; and to build active employee support for management's [15] goals and objectives. Toward that end, GE has fashioned an elaborate employee communications system, making use of plant newspapers, daily news digests, employee bulletins, letters to employees' homes, television and radio broadcasts and other media of mass communication, as well as personal contacts. Supervisors are instructed as to GE's views on [20] controversial subjects and are expected to speak out to employees on such subjects and seek to gain employee confidence in the correctness of company decisions. The direct employee communications —if 1960 may be considered as representative—are utilized on a most extensive scale both before and during negotiations to influence employee attitudes to a favorable reception [25] of the Company's views and rejection of the union's conflicting positions. After the Company's offer is presented to the unions, the flow of communications, directed towards that end, reaches flood proportions. At that time, the Company also discusses the terms of its offer at plant meetings; invites employees to take up individually with their supervisors or [30] managerial officials any questions they may have about the offer; and seeks through direct contact of its supervisors with employees to sound out for its own guidance employee reactions to its offer. The avowed purpose of the communications program is to equip employees to render their own independent judgment on matters commonly affecting their own interests and [35] those of the Company. But, as related to bargaining issues, the record in this case, as will be seen, leaves no doubt that GE's more basic purpose is to compete with the bargaining representative for the allegiance and support of employees.

[40] Another consideration which shapes the Respondent's approach to bargaining is its uniformity policy.

As noted above, GE deals with some 100-odd unions. With regard to wage and benefit improvements, it is GE's policy to see to it that no [45] union gets more favored treatment than any other. GE justifies that policy on the basis of fair play, business realism, and as necessary to avoid whipsawing. In line with that policy, GE prepares and presents to substantially all unions with which it deals the same basic offer with regard to wage adjustments and benefit programs.

[50] Moreover, as further noted above, about half of GE's employees are unrepresented. Representation elections frequently are held among different groups of such employees, and sometimes decertification elections among groups of employees previously represented. Where such elections [55] are held, GE engages in preelection campaigning in which it makes no secret of its opposition to union organization. In urging its employees to vote against union representation, GE emphasizes, *inter alia,* that a union can obtain for them no benefits they would not otherwise receive. It points up the Company's policy to "do right voluntarily" and to put into [60] effect for nonrepresented employees the same pay and benefit program it makes available to represented employees.[7] In keeping with such assurances,

GE applies in the case of its unrepresented employees the same principle of uniformity that it applies to represented

[7] What is said here is not meant to suggest that GE's participation in such election campaigns is illegal. No GE election has ever been set aside because of improper preelection conduct by the Company.

groups. The terms of the basic offer made to unions are also put into effect for nonrepresented employees. Prior to 1960, GE invariably withheld such action until [5] either the IUE contract had been settled or the anniversary date of the prior IUE contract had expired.

Theoretically, it is possible for company negotiators engaged in negotiations with a given union to improve as to that union the basic [10] offer made by GE to unions generally, even though the offer has already been put into effect for other bargaining units or for unrepresented employees. But the Company witness testifying on that point—Virgil B. Day, now Vice-President-Relations-Service—could recall only one instance where that was ever done. And that, as appears from his testimony, involved a [15] situation squarely falling within the stated exception to GE's "fair and firm offer" approach, namely, that GE will change its offer where a new significant development has occurred to make that change "right."[8] In one important area, however, the Company's negotiators have no flexibility whatever. As appears from Day's testimony, the Company insists [20] for practical reasons on a single uniform pension plan covering all GE employees, and once an offer has been put in effect for other bargaining

[40] [8] That change occurred in 1953. As appears from Day's testimony, GE had settled that year with other unions and had also put the benefits of its basic offer in effect for nonrepresented employees, but the IUE had held out for more past the anniversary date of its contract, without, [45] however, striking. A "break-through" had then occurred in the national wage pattern as a result of a settlement in another major industry. It was one which the Company felt would soon be reflected broadly throughout the economy. Moreover, the Company at that time was faced with a tight manpower situation and was fearful of being placed at a [50] competitive disadvantage in the labor market. Accordingly, it recognized the "break-through" as a significant "new fact," changed its offer to the IUE accordingly, and in line with its policy to "do right voluntarily" provided a similar adjustment to the unions with which it had already settled, as well as for its unrepresented employees.

units or for nonrepresented employees, the freedom of negotiators to effect changes is foreclosed. The significance of what has just been said will become more clear when the course of the 1960 negotiations is reported.

[25] 2. Preparations for 1960 Negotiations

The prior collective bargaining agreement between GE and IUE, negotiated in 1955, was for a 5-year term ending October 1, 1960. The [30] agreement when made was considered by the IUE a highly satisfactory one. Among other economic improvements of substantial benefit to employees, the package provided for an immediate 3 percent general wage increase; for additional annual increases amounting to 3 percent each in 1956 and 1957, and 3½ percent each in 1958 and 1959; and for a cost-of-living escalator [35] clause, which resulted over the 5-year term in "adders" totaling some 10 percent. The 1955 contract also contained a reopener provision allowing the IUE to reopen the contract in 1958 for the negotiation of employment security items only.[9]

---

[55] [9] It is GE's practice to give the IUE (and also the UE) an informal oral outline of the contents of its basic offer about a day before formal presentation of the offer is made to the IUE and other unions with which GE is engaged in negotiations. That was done in 1955 at a dinner meeting attended by Vice President Boulware and [then] Union Relations Manager [60] Virgil Day, for the Company, and by President James B. Carey and Conference Board Chairman John H. Callahan, for the Union.

[45] When the informal outline was given, Carey declared his agreement in principle with the economic package, but expressed the view that some other features, particularly in the employment security area, were needed to make the offer acceptable. At his request, the GE representatives agreed to withhold for several days the formal [50] presentation and public announcement of its offer to allow the IUE a preliminary opportunity to negotiate further on matters in difference before GE froze its offer. In the intervening period, Carey met with Boulware informally and discussed the Union's strong objections to a 5-year contract without employment security provisions. At a regular [55] negotiating

(Footnote continued on following page)

In 1958, the IUE reopened the 1955 contract for the negotiation of employment security items. GE rejected all the Union's demands. The Company proposed instead a so-called Savings and Security Plan which provided for employee investment in Company stocks and bonds. The same [5] Savings and Security Plan was simultaneously offered to other unions and was later also made available to unrepresented employees. The IUE rejected the plan proposed by the Company as unrelated to the problem of employment security, but the Company stood firm. The result was a stalemate. The Union failed to muster sufficient support for a strike [10] vote. In the wake of the 1958 negotiations, the IUE changed its constitutional provisions so as to provide for a majority instead of as theretofore a two-thirds vote of the GE Conference Board to call a national strike.

[15] As the end of the 1955 contract neared, both sides began to prepare for the oncoming 1960 national negotiations.

In late 1959, the IUE and four other member unions of the AFL-CIO Industrial Union Department representing bargaining units in the GE chain [20] formed a loose coalition for the purpose of exchanging information and coordinating certain other activities related to the 1960 negotiations. The IUD group distributed to their represented

---

(Footnote continued from preceding page)

meeting the next day—this was still before formal presentation or public announcement of the offer was made—GE agreed to include in its offer the 1958 reopener, and the union negotiators agreed on that basis to recommend acceptance of the Company's offer when formally presented. Thus, in 1955, substantial agreement was worked [60] out between the GE and IUE before GE presented its formal offer to the IUE and other unions and announced it publicly. When the GE offer was formally presented to all unions a day or so later, it incorporated the 1958 reopener provision.

employees in the GE and Westinghouse chains a ballot listing some 19 demands—substantially all of which later appeared in the IUE contract proposal. Employees were asked [25] to indicate on the ballot the order of priority in which they desired such demands pressed. Later, after the IUE bargaining demands were formulated and publicly announced, the IUE put on the road a so-called IUE Caravan which visited various GE locations for the purpose of dramatizing to the employees and the communities the nature, need and reasonableness of the [30] IUE bargaining objectives. The IUE bargaining objectives were also publicized in publications of the IUE and its Locals, and, it is reasonable to infer, though there is no specific evidence on this point, at Local meetings as well.

[35] Even before the IUE bargaining demands were formulated, however, GE was able to anticipate the major bargaining issues with which it would be faced in the 1960 negotiations. Thus, GE quite reasonably expected the IUE to renew its 1958 employment security demands—such as for supplementary unemployment benefits, the right of employees to follow jobs to other [40] plants, restrictions on the subcontracting out of work during layoffs, neutralization of the effects of automation, etc. From its own employee attitude surveys and other research, GE had satisfied itself that employment

security was a matter of deep concern to employees. Moreover, GE anticipated that it would be confronted with a serious wage issue in the 1960 negotiations. It had come to regret its 1955 wage settlement, particularly the cost-of-

living escalator feature thereof which had proved far more [5] costly than it had foreseen and to the continuance of which it was now opposed in principle as having an inflationary tendency. It was also of the view that the annual wage improvement factors provided for in the 1955 contract were no longer appropriate in the light of the current economic climate and wage adjustment patterns. At the same time, GE was [10]aware, as its communications reflect, that the Union would make much of GE's substantial profits and productivity rate as justification for continued wage increments along the lines of the 1955 contract.

GE early realized that it would be confronted with greater [15] problems than usual in the 1960 negotiations. It knew well ahead of the start of negotiations that its 1960 offer would be far less attractive to the Union in terms of economic content than, say, its 1955 proposal. It knew, too, that it was faced with a special problem in the area of employment security, particularly since the Union's failure to get anywhere [20] in 1958 with its employment security demands had left a sour taste. Moreover, taking into account the reactivated IUD coalition and other considerations, such as the IUE constitutional change relating to strike votes, GE was persuaded that the IUE leadership was determined to press hard in the 1960 negotiations for its major contract demands. On the basis [25] of its total appraisal of the situation, GE feared that the perennial risk of a strike was potentially greater in 1960 than in prior years. Long before the 1960 negotiations began, GE concluded that the solution to its anticipated problems lay largely in a carefully prepared and particularly intensified communications program designed to build employee

support for [30] its positions, as opposed to the Union's, on the bargaining issues that were likely to arise.

As early as November 1959, GE headquarters drew up a list of topics with brief digests of supporting arguments, on which communications [35] to employees would be appropriate. Then, during a 2-day meeting of plant Employment Relations Managers ("ERMs"), held at New York in December 1959, these topics and a program for preparation of materials were outlined fully. The topics and supporting digests, under the heading *"Communication Topics (Prior to Negotiations)"* were later incorporated in a monograph released [40] in March 1960 to plant communication personnel, entitiled "Building Employee Understanding." Among the 28 topics included were the following (citing here only the topic headings): "How automation makes more and better jobs"; "How subcontracting helps to keep us competitive; helps make jobs secure, helps other businesses, etc."; "Role of profits in providing jobs"; [45] "Why employee 'expectations' should be realistically modest in 1960"; "The Why and How of curbing inflationary settlements"; "'Escalation' vs. Inflation"; "Why S. U. B. is not the answer to employment security"; "The problem of guaranteeing transfers to employees during plant moves"; "The fallacy of using 'ability to pay' as a guide to wage and benefit [50] levels—a tie-in with the profit story"; "Why employees could not gain and certainly would lose by striking"; "Why the Company has no choice but to 'take' a strike rather than be forced beyond what is right"; "Why employees can expect their union officials to 'demand' a strike from them"; "Show how employees not represented by unions get their wage and bene-

fit [55] improvements without the possible delay of waiting for union acceptance.

Following the prepartion of the list of topics, the Company issued as to some of the topics detailed communication guides for the suggested use by ERMs at plant locations, containing basic messages, news [60] stories, editorials, questions and answers, photo features, letters to employees, and other material, which, with appropriate revision to meet local conditions, might be used to develop the communication topics.

12

These guides set forth in detail the Company's arguments on automation, the necessity for profits, opposition to supplementary unemployment benefits, the need for subcontracting, and on other matters on which bargaining issues were anticipated. The record shows that the communication program [5] outlined above was thereafter widely applied in plant newspapers and other employee communications issued before as well as after the commencement of negotiations.

The monograph, "Building Employee Understanding in 1960," embodies [10] the blue print of the Company's communication program, at least in its earlier stages. The document asserts it to be the employer's responsibility to provide full and accurate information on [negotiation] issues," [10] so that employees, rather than rely upon what they are told by their union officials, may make their own

[10] Actually, however, as the Respondent eventually conceded at the hearing, GE does not attempt to provide "full" information but gives its own one-sided presentation, on the theory that the Union can, should, and [60] does take care of its side of the argument.

personal assessments, see to it that their [15] union officials act as their servants rather than their masters, and direct their union officials to pursue a course that the employees decide for themselves is in their own and their employer's common best interests. In making that assessment--the monograph adds—the employees should be asked to consider whether they have any personally valid reason for striking [20] whether union officials when demanding a strike are not "politically motivated by reasons of their own"; whether a strike is likely to bring about any improvements; and "whether the certainty of heavy pay losses in a long strike may be worth suffering when balanced against the uncertainty of any real gain." (As to the last, the monograph comments, "His [the [25] employee's] information needs on the subject of strike losses inside and outside the Company are thus evident.") The document also emphasizes the need for employees to understand the careful research undertaken by the Company to develop a proposal that "best suits the needs of employees and the Company in which they make their living," as well as the Company's policy [30] when making a proposal to hold nothing back for horsetrading. The manner in which GE in its subsequent direct communication to employees implemented the foregoing program, planned long in advance of negotiations, will be shown more fully *infra*.

[35] Further in preparation for the 1960 negotiations, Vice President Parker and Union Relations Manager Moore, along with several consultants, made a swing around the GE chain in early 1960 to discuss with plant managers and others the particular business needs, local issues, and employee attitudes and desires that might have

to be evaluated in shaping up the [40] Company's 1960 contract proposals. In the course of their trip, Parker and Moore stopped at some 16 area locations where they spoke at general meetings to some 13,000 supervisors and some 700 to 800 section and department heads of all components of the Company. Moore in his prepared address to supervision stressed, *inter alia,* that the solution to the 1960 [45] negotiation problems would be

> along the lines of the communication that you are doing—both written and oral—and the man-to-man communications and relationship that you have built up, because really *what you're* [50] *doing is establishing your credibility as against the time when you'll need it,* and one of the times that you are going to have to draw on it is this fall *when the votes are cast whether the folks believe you or believe the opposition.* (Emphasis supplied.)

13

In his discussion of the role of the supervisor in securing employee acceptance of the Company's position, Moore said:

> Now, whether we have a strike next fall depends not alone, [5] however, on whether employees believe they have an appropriate offer from General Electric Company and have received satisfactory day-to-day treatment from their bosses. *It also depends on whether employees believe they can gain anything further by a strike. And, lastly, it also depends* [10] *on whether employees understand that they will be asked to strike in any case to support the political ambitions of some union officials.* (Emphasis added.)

He further told the supervisors that "you owe it to [employees] to let them [15] know every chance you get certain hard facts." For one thing, employees must be made to understand that it is "better for all concerned, including employees, for the Company to take a long strike now than to yield to demands that would threaten sales and jobs in the future." For another, the employees should be made "to understand the motivation of union [20] officials who foment trouble for trouble's sake" and "simply to further their own selfish ambitions."

Parker in his comments likewise emphasized that the Company's success in presenting its proposals would depend largely on its supervisors' [25] effectiveness in gaining employee acceptance through "personal individual man-to-man communication." Parker rejected as untrue the belief of some that but for the Union's negotiating stand the benefits GE made available to its employees would not be forthcoming. He emphasized that the Company framed its offer on the basis of its own careful research, voluntarily [30] putting into its offer all it considered appropriate in light of the best interests of all associated with its business. He stressed that the Company, once having decided on what was appropriate, would not as a matter of policy yield further concessions by reason of a threat of force, for to do so, he said, would only open the door to future union shows of strength and [35] demands for more. The Company had long since resolved, said Parker, that "if you are going to take a strike you might just as well take it now [and] we are completely relaxed on this front." Parker identified the Company's bargaining approach as that of Boulware, which he described as follows:

[40] The Boulware approach to this has been that we would go forward and do the things which we felt appropriate. We would then offer these to the Union and if they saw fit to accept them, why God bless them, but if they didn't well they could do something else.

[45] 3. Prenegotiation meetings

The 1955 National Agreement provided for notice of modification or termination not more than 60 days and not less than 30 days prior to [50] October 1, 1960. Negotiations were to begin within 15 days after such notice.

On December 22, 1959, IUE President James B. Carey wrote GE Board Chairman Ralph J. Cordiner requesting an "informal and unpublicized discussion on matters of mutual concern." Cordiner referred Carey to [55] Moore, stating that GE had delegated to Moore full responsibility for dealing with the IUE. On January 26, 1960, representatives of the IUE and of GE met at an informal meeting arranged between Carey and Moore. Carey asked GE to join with the Union in putting together a common body of information for the 1960 negotiations. Moore agreed to do so to the extent [60] it was appropriate and possible. He asked Carey to submit in writing the Union's specific requests for information.

On March 7, 1960, the IUE submitted to GE a written request for information relating to employment and layoff statistics, hours worked, average earnings, and the operations of the Company's pension and insurance plans.[11]

[60] [11] The information requested as to the pension and insurance plan, or most of it, was information GE was required to furnish under its then existing agreements with IUE.

[5] Between March 7 and May 5, 1960, IUE and GE representatives held several additional meetings relating to the subject of information.

During that period, as contrasted to a later period after [10] negotiations began, GE displayed a clear spirit of cooperation in furnishing the Union the information it desired. There were a number of instances where GE thought it was not feasible or too costly to supply the information precisely in the form requested. In those instances GE suggested and the Union consented to a different basis of submission that would substantially [15] meet the Union's needs. In the end the Union expressed satisfaction over the manner in which GE had within reason complied with its prenegotiation requests for information.

At the preliminary meetings, Carey at various times urged early [20] negotiations, starting well ahead of the time stipulated in the contract. More specifically, he suggested May 24, 1960, which was the scheduled date of the Conference Board meeting at which the IUE planned to have its 1960 bargaining demands formulated. Moore though it too soon to decide, but agreed to take the Union's request for early negotiations under advisement.

[25] In late May, GE agreed to meet with the IUE on June 13, 1960, but solely for the purpose of hearing the IUE's presentation and explanation of its 1960 contract demands. GE made it clear that its agreement to meet was subject to the express reservation that the meeting would not be [30] construed as the opening of negotiations.

D. *GE's refusal to bargain on June 13, 1960 with respect to its personal accident insurance proposal*

[35] The parties met, as arranged, on June 13, 1960. At the very outset of the meeting, the Union, before presenting its 1960 contract demands, brought up for discussion a recent proposal made by GE relating to the coverage of IUE-represented employees under a group personal accident [40] insurance policy. The proposal had first been submitted to the Union after arrangements had been completed for the June 13 meeting.

On June 1, 1960, GE advised the IUE by letter that it had arranged with an insurance company for an accidental death or dismemberment group [45] insurance policy under which all GE employees desiring to do so might participate, the full cost of the insurance to be borne by the participating employees. The letter stated that the decision to make the insurance available had "resulted from intensified employee interest in additional coverage of this type." The insurance was to be made available as of [50] July 1, 1960. If the IUE had no objection to make the proposed insurance available to employees in IUE-represented units, GE would proceed to have this done by the date mentioned, in advance of the employees' vacation periods. However, if the Union desired to defer action, the insurance would still be available for IUE-represented employees at any later time [55] the Union desired. GE closed its letter with the assertion that it did not regard the new insurance as related to the forthcoming negotiations, but simply as an opportunity for personally interested employees to secure additional insurance at a lower cost than would normally be available to them as individuals.

The plan for the new accident insurance had been publicized to all GE employees prior to the June 13 meeting, along with an announcement that enrollment would take place during the week of June 20-24, 1960.

[5] The existing insurance plan incorporated in the IUE-GE 1955-1960 agreement already provided for accidental death and dismemberment insurance coverage in a limited amount under a contributory arrangement, with the Company and covered employees sharing the cost. The new proposed insurance, which was of a similar nature, was to be in addition to that provided for [10] in the contract, but its full cost was to be borne by employees electing to participate in the group policy.

Under the 1955-1960 IUE-GE Pension and Insurance Agreement, each of the parties had waived the right to require the other party to bargain [15] as to pensions or insurance matters during the term of the agreement, except during the stated renegotiation period.

At the June 13 meeting, the Union objected to the Company instituting the new insurance without first bargaining about it. Carey [20] contended that the Company's proposed plan was connected to the basic insurance plan covered by the contract and was a bargainable matter. He declared that the Union did not desire to defer the matter until the start of formal negotiations, but was prepared to negotiate on the Company's insurance plan that day and to reach agreement thereon. At [25] various times during the ensuing discussion, Carey stated (a) that the Union was opposed to its members paying the cost of the insurance; (b) that the cost as reported by the Company was in any event too high and could be substantially lowered

by a blanket policy covering all employees; (c) that if the proposed insurance were to be put into effect as proposed, it would [30] prejudice the Union's ability and opportunity later to negotiate on its program for improvements in the insurance schedule and for an increase in the amount of the Company's contributions to the cost of insurance, and (d) that the Company in offering the insurance at that time on a take-it-or-leave-it basis was attempting to discredit the Union and [35] "undermine" collective bargaining by making it appear that the Union, if it deferred action, was depriving employees of a benefit they could have had during their vacations. Subsequently, the Union advised the Company in substance that it would interpose no objection to the Company putting the new insurance into effect at the time proposed, provided GE paid the full [40] cost of the insurance pending bargaining on the subject. But such bargaining, it stated, should be conducted without delay.

The GE representatives took the flat position that the proposed new insurance was not a bargainable subject at that time under the terms [45] of the existing agreement. It might perhaps become so, they stated, after the beginning of formal negotiations later on. In the meantime, the Union could either accept the insurance as offered or reject it. If the Union declined to accept the proposal as made, the Company would respect its wishes, and would not put it in effect for the IUE represented employees. [50] It would, however, go ahead with its plan to make the new insurance available for all other employees before vacation time.

At the same time, however, Moore unsuccessfully sought to convince Carey that GE had no ulterior motive in mak-

ing the added insurance [55] available at that particular time. He assured Carey that the Company would not attempt to embarrass the Union by making capital of the Union's refusal to allow its members to participate in the new insurance plan on the basis prepared.

[60] There was no further change in the positions of the parties. The Company went ahead with its new insurance plan as to other employees without offering participating rights to IUE-represented employees. GE kept faith with its promise not to make capital of the Union's rejection. In a teletype to ERMs at plant locations sent out on June 14, 1960, Moore urged

16

them to "take pains to not publicize that IUE objections prevented us" from offering the insurance to IUE represented employees. So far as appears, the ERMs generally complied.[12]

[5] The General Counsel and the Union assert that in the subsequent formal contract negotiations, GE again refused to bargain on the subject of the personal accident insurance. A fair reading of the record does not support that assertion, however. So far as appears, the Union never made the added accident insurance a matter of formal demand during the [10] negotiations. The negotiating minutes in evidence do show that casual reference was made to the subject on several occasions. But on each occasion, it came up simply in the nature of a complaint by the Union negotiators concerning GE's past conduct. Dur-

[12] In thereafter announcing the enrollment dates for such insurance, however, some of the plant publications noted that "Employees in [60] bargaining units are eligible provided there is no objection to this Insurance on the part of the unions."

ing the negotiations, GE told the Union on several occasions that the added personal accident [15] insurance was still available for IUE-represented employees on the original terms if the IUE wished it. The IUE did not wish it on that basis, but never during the formal negotiations suggested any specific alternative arrangement.

[20] E. *Presentation of IUE's contract proposals to GE on June 13, 1960, and GE's Communications to employees with reference thereto in advance of bargaining*

[25] At the June 13 meeting, the Union presented its contract proposals. The proposals had theretofore—on May 24—been formulated at a Conference Board meeting and had been widely circulated internally to the Union's membership, along with supporting arguments.

[30] The Union's 1960 contract proposals included demands for (1) a 3½ percent annual wage increase; (2) continuance of cost-of-living escalation; (3) improvements in holidays and vacations; (4) establishment of a joint labor-management committee to recommend adjustments for sharing the benefits of automation; (5) equal pay for equal work; (6) supplemental [35] unemployment benefits (SUB); (7) separation pay; (8) a union shop; (9) unemployment security provisions, specifically, the right of employees to follow their jobs transferred to other plants and restrictions on the subcontracting of work normally done at a plant and on overtime work while plant employees are on layoff; (10) limited paid sick leave; (11) various [40] improvements in the existing pension and insurance plans; and (12) numerous revisions in the National agreement as to noneconomic matters.

There was no discussion of the Union's proposals at the time, except for clarification of some of the items in response to questions [45] from the Company side of the table. At the end of the Union's presentation, Moore simply declared that the Union's proposals were "ridiculous," "astronomical" in terms of cost, and not designed for an early settlement. At the end of the meeting, Carey again requested early negotiations. Moore said he would take the request under advisement.

[50] The Company did not wait for negotiations to begin before proceeding to present its case directly to its employees, as, indeed, on some bargaining issues it had already long been doing in anticipation of union demands. The Company obtained reprint rights to certain newspaper [55] articles which were critical of the Union's demands and sent them to

plant ERMs for suggested publication in employee communication media. One of the newspaper articles reprinted in employee news media inaccurately estimated the cost of the Union's demands for recognized employees alone at a half billion dollars. On July 1, the Company issued a four-page [5] Relations Newsletter, entitled "Another Round of Astronomical Union Demands versus 1960 Problems."[13] In a subsequent teletype, it advised the ERMs that "Supervisors should be able to discuss this subject with employees on the basis of the July 1 Relations Newsletter and the interest generated [by] the news stories."

[40] [13] The Relations Newsletter does not go directly to employees but is designed for distribution to managerial and supervisory personnel and to community thought leaders

[10] The July 1 Newsletter discussed the IUE demands largely in terms of their asserted adverse impact on employee job security and resultant injury to GE plant communities. The letter stressed that the IUE demands if met, would add more than $500,000,000 to GE's total employment costs [15] in the next 2 years. The added cost burden, it said, "could destroy thousands upon thousands of jobs." The problems of 1960, the letter went on, were different from those in earlier years. GE was now faced with menacing competition from Japan and Europe as well as from domestic sources. Moreover, new communities were taking away business from older communities. [20] To meet these problems, it was imperative to maintain prices at levels that would attract customers and sales in increasing volume; only by doing so could employment be maintained at present levels. Additional employment costs would inevitably lead to loss of jobs by subtracting from GE's ability to compete. The letter also set out at length the Company's arguments in [25] answer to the principal justifications for increased wages and employee benefits given by the Union during the presentation of its demands but not answered by the Company at the time.[14] The letter also reiterated that it was GE's intent, when the time came, to make a fair and "firm" offer that would include "everything" shown by its total research to be in the common [30] best interests of employees, shareowners, and others

[14] The Union had justified its economic demands largely on the basis of productivity considerations, pointing particularly to GE's constantly [45] increasing sales and ever growing profits as contrasted to a declining employee complement. The Company's answering argument as given in its letter was substantially this: To maintain employment at present levels in the current competitive climate, it was essential to increase both the output per job and the volume of sales each year; to do so required [50] a constantly increasing investment per job in the form of improved equipment and facilities; and to attract investment capital it was necessary to have steadily rising profits.

concerned with the success of its business. Moreover, the Company by its offer would try to do everything it could to make sure that employees had no valid reason from *their* standpoint to strike or to permit themselves to have a strike imposed on them from above. In conclusion, the letter cautioned against acceptance [35] of the sincerity of Carey's recent statements that he neither expected or wanted a strike, suggesting that in truth Carey was "determined" for reasons of his own to strike GE in 1960, regardless of the fairness of GE's offer.[15]

18

The July 1 Newsletter set out the basic lines of GE's employee communications program during the period beginning in early July (before the start of negotiations) and continuing through the end of August when the Company's offer was presented. The themes expressed in the Newsletter [5] were widely broadcast to employees in plant communication media, through news stories, articles, editorials and other means. The theme stressed above all was that the Union's "astronomical" demands, even if granted only in substantial part was bound to result in the destruction of numerous employee jobs. The communications constantly reiterated that [10] GE was now engaged

[15] Reference was made, *inter alia*, to a statement, "I owe GE a strike" attributed to Carey in an article relating to him that had appeared in [55] the July *1959* issue of "Steel," a trade magazine with a limited circulation in the metalworking industry. Though this is disputed, I accept the testimony of the reporter who interviewed Carey that the attributed statement was actually made. The quotation was picked up by GE long before the start of the 1960 negotiations and was constantly [60] reiterated by it in its employee communications as evidence of Carey's asserted determination to strike GE in 1960 for purely personal reasons. Carey in his personal contacts with GE officials had theretofore protested GE's use of the quotation, had claimed that it was inaccurate, and had sought to assure GE of his genuine desire to come to a peaceful agreement. This, however, did not deter GE from continuing its constant references to that statement in its employee communications.

in the greatest competitive struggle in its history; that maintenance of current levels of employment depended on GE's ability to compete successfully for customers and sales while at the same time maintaining profits sufficiently high to attract investment capital; that the Union's proposed remedial program for meeting the [15] problems of job security would only have an opposite effect by adding to GE's production costs at a time when it was vital to the best interests of all concerned with GE's success to keep such costs at a minimum; and that any substantial rise in employment costs would force GE out of markets and employees out of jobs.

[20] At the same time—particularly at the larger plants, although even there the nature, scope and content of the communications varied from plant to plant—GE plant publications continued to carry with steadily increasing frequency and volume articles, news reports, editorials, [25] displays and cartoons, indoctrinating employees with its views on certain specific bargaining issues and other topics outlined in "Communication Topics (Prior to Negotiations)," referred to above, and bearing also on related subjects, such as how good GE jobs were, the features of GE benefit plans, how profits create jobs, the danger of a strike being imposed on [30] employees by the Union's leadership, how strikes cause loss of orders and jobs, etc. The communications also sought to build up an image of the Company as the protector of employee interests, pointing up how the Company voluntarily sought to do what was "right" by engaging in careful research to determine employees' real needs and to fashion a fair and firm offer [35] that would give employees "everything" that was appropriately coming to them.

F. *The 1960 negotiations as a whole*

1. Arrangements for negotiations

[40] At the June 13 meeting, the Company had stated that it would take the Union's request for early negotiations under advisement. Having received no response, Carey wrote Moore on June 29, renewing the Union's request. Moore replied by letter on July 8. He stated that the mid-August [45] opening date contemplated by the contract should provide ample time to examine the Union's "familiar demands" in the pay and benefit areas. As for the Union's union shop and SUB demands, he added, the Company's "convictions," already well known to the Union from prior negotiations, had been reconfirmed by the Company's "continuous research." However, [50] recognizing the employees' concern over job security, Moore thought "it would not be amiss to meet early if the additional time is spent in a mutual exploration of any grass roots opportunities that may exist for improving employment continuity." On that basis, said Moore, the Company was ready to go forward with the Union's proposal for early negotiations, [55] starting July 19, with the first 6 days spent hearing from local IUE officials from each location where "you feel a problem is of sufficient importance to warrant this study," after which it might be desirable to call in ERMs from various plants to "give the national negotiators the benefit of their knowledge of the local situations." In a later communication [60] to the Union, Moore made clear that what he had in mind was to devote the early sessions exclusively "to discussions of the causes of such unemployment as appears at the plant

level and the solutions that may be seen by those closest to the problem."

19

Carey quickly agreed to the suggested early opening date but objected to Moore's proposed limitations on the scope and purpose of the early meetings. He declared that the Union wanted full negotiations, although it was prepared to begin with the subject of employment security.

[5] After a further exchange of communications, and a preliminary procedural meeting held between GE and IUE representatives, the parties finally agreed that the early meetings should be negotiating and not simply review sessions. More specifically the parties agreed as follows: [10] The early negotiations would start the following day, July 19, with employment security as the first subject on the agenda. If agreement was reached on employment security prior to August 16, the parties would proceed to other subjects at once. If no agreement on employment security was reached by August 15, the parties would then go on to other matters, [15] but employment security would remain a subject for negotiations.[16]

At the July 18 meeting, the parties also agreed on a schedule of meeting dates for the negotiations as a whole, extending through September. It was also agreed, *inter alia*, that there would be no meetings [20] between September 8 and September 20, because of the IUE convention that was scheduled for the week of September 12.

---

[16] In a teletype to ERMs sent out that day, GE took full credit for the start of early negotiations. The teletype stated, "The *Company* proposal to begin negotiations a full month ahead of schedule for the purpose of [60] concentrating on the subject of employment security was accepted by union officials." (Emphasis added.) The substance of the teletype was thereafter published in plant communication media.

2. Chronology of more significant dates and events

[25] Formal negotiations opened on July 19, 1960, and continued at some 45 meetings over a period of approximately 3 months, ending on October 22, 1960, during the last 3 weeks of which the Union was on strike. The course of the negotiations, along with related events which occurred [30] away from the bargaining table, will be reviewed at length below. It may be helpful, however, in order that ready reference may be available at one place for clearer focus, to set forth at the outset a table listing the more important dates which mark phases or turning points in the history of negotiations to be recounted below. The table follows:

[35] *July 19-August 11, 1960:* Early negotiations limited to the subject of employment security.

August 1, 1960: Union serves notice of termination of the [40] 1955-1960 agreement on its October 1, 1960, expiration date.

August 16, 1960: Negotiations on the Union's general demands begin.

[45] *August 29 and August 30, 1960:* The Company, informally on August 29 and formally on August 30, presents its offer to the Union.

September 8, 1960: Negotiations are suspended until September 20 because of the IUE convention.

[50] *September 13, 1960:* Resolution adopted at the IUE convention calling for a vote by IUE locals in the GE chain on Sunday, September 25, on the recommendation of IUE

negotiating committee to reject the Company's [55] offer in its then present form.

20

September 16, 1960: The Company launches a campaign to induce local officials and unit employees to change the time, place and conditions of voting and to influence employees to vote against striking, stressing, *inter alia,* the finality of its offer and its fixed policy not to make [5] concessions to avoid a strike or threat of strike.

September 20, 1960: Negotiations resume. GE declares that its full offer is on the table and that there is nothing more to come.[17] On the same day, GE authorizes its local general managers to put into [10] effect for nonrepresented employees wages and benefits contained in its basic offer to IUE and other unions.

September 21, 1960: The Federal Conciliation and Mediation Service enters the negotiations at the request of the Union.

[15] *September 22, 1960:* The Union presents a written request for information relevant to bargaining issues, embodying in part the content of prior requests not granted. The request is not complied with except in part and then only after the end of the strike.

[20] *September 29, 1960:* GE rejects Mediators' proposal for a truce on the basis of an extension of 1955-1960 agreement beyond its October 1, 1960, expiration date and states the conditions under which it plans to continue operations after the contract expiration date.

[60] [17] The extent to which modifications were thereafter made in GE's offer and the character of such modifications will be considered *infra.*

[25] *September 30-October 4, 1960:* GE offers IUE's Schenectady and Pittsfield locals strike truce terms on conditions more favorable than it had theretofore offered the IUE national negotiations.

[30] *October 2, 1960:* The Union strikes. Negotiating meetings continue.

October 10-October 20, 1960: GE engages in additional conduct alleged by the General Counsel to constitute direct local bargaining in derogation of the IUE's status as the national representative.

[35] *October 19, 1960:* The Company declares that negotiations have reached an impasse.

October 19 to 22, 1960: The Union capitulates. Negotiations are [40] conducted for a strike settlement.

October 22, 1960: The strike ends.

October 27 to November 23, 1960: Meetings are held for the [45] purpose of drafting definitive contract language and to settle certain items theretofore left open.

November 10, 1960: New 3-year agreement is concluded and signed.

[50] 3. Employee communication during the period of negotiations—in general

As earlier noted, GE declares it to be its policy to keep employees informed of the progress of negotiations so that they may form their own [55] independent judgments on the issues involved and guide their bargaining agent accordingly. While formal negotiations were in progress in 1960, GE headquarters sent to its plant locations, in most

cases by teletype, daily reports on the negotiations. The reports were prepared by communication

21

specialists employed in a company service component under the jurisdiction of Moore. They were utilized at the plant levels for purposes of employee communication. At some plants the teletyped accounts were published substantially in full in daily negotiation bulletins or other media of [5] employee communication; at others only the highlights were given either daily or at broader intervals. At least at some plants, the reports purported to provide the employees with a *full* account of what occurred in the conference room. But a comparison of the reports with the negotiating minutes shows that not to be true. The accounts given were slanted in [10] the Company's favor, sometimes presented the Company's arguments to the employees more fully than the Company did at the bargaining table, frequently failed to present the Union's position at all, and, when stating the Union's contentions, often did so in a manner so abbreviated or editoralized as to give an inaccurate or unfavorable impression of the [15] Union's position on the issues. The reports seized almost every occasion that presented itself to disparage, belittle or ridicule the Union's principal negotiator by pointing up behavior at the bargaining table as well as positions taken by him in such a manner as to cast him in an unfavorable light.[18]

[18] This is not to suggest that the Company's criticism of Carey's behavior [30] was altogether without foundation. Carey by some of his behavior at the bargaining table exposed himself to and invited much of it. The negotiating minutes reveal Carey as an aggressive, highly articulate and voluble negotiator with a bent for tough talk and invective. He obviously felt frustrated by his

(Footnote continued on following page)

[20] The communications to employees, however, were not limited to reports on the progress of negotiations. Throughout the period of negotiations, the employees were subjected to other communications relating to the negotiations in the form of plant newspapers, employee bulletins, [25] leaflets, letters to employees' homes, newspaper advertisements, press releases and radio and telephone messages.[19] GE also communicated with

---

(Footnote continued from preceding page)

failure to get anywhere in the [35] negotiations and showed it. He engaged on occasions in time-consuming harangues and not infrequently in side excursions into perhaps interesting but wholly irrelevant subjects. On a number of occasions, he displayed an explosive temper (several times to the point of threatening physical violence) and was frequently uninhibited and a few times wholly [40] unrestrained in expressing his opinion (low) of some of the Company's negotiators. He was at times also highly critical of GE top management. The Respondent in its brief makes much of Carey's behavior at the bargaining table, devoting some 42 pages to excerpts from its negotiating minutes bearing on that subject. The Respondent makes no claim, [45] however, that Carey's conduct influenced the actual course of bargaining in any substantial way. I am satisfied that it did not. It is quite clear from the record as a whole that the Company planned from the beginning to downgrade Carey in its employee communications program relating to the negotiation. (See, *e.g.*, "Communication Topics (Prior [50] to Negotiations)".) Carey's conduct adverted to above provided the Company, I believe, with not unwelcome ammunition with which to do so.

[19] Not all the written publications are in evidence. The General Counsel and the Respondent, pursuant to a stipulation to limit proof, each selected the publications of three of the larger and five of the smaller [55] IUE-represented GE plants as a sampling to show the range and character of the Company's communications to its employees and the general public between June 13, 1960, and October 24, 1960. These exhibits alone occupy a full drawer of a standard sized filing cabinet. The communications at the various plants, although in major respects similar in theme, are [60] by no means identical, and also vary greatly as to their volume. In the case of some multidepartment plants, not all communications went to all employees. The General Counsel selected the following larger plants (with the number of separate communications for each [50] plant shown in parentheses): Schenectady, New York (246); Pittsfield, Massachusetts (277); and Bridgeport, Connecticut (152). He selected the following smaller plants: Rome, Georgia (115); Burlington, Vermont (143); Tyler, Texas (65); Memphis, Tennessee (43); and Waterford, New York (60). The Respondent selected from larger plants: [55] Fort Wayne, Indiana (142); Louisville, Kentucky (243); and Philadelphia, Pennsylvania (118). It selected the following smaller plants: Jonesboro, Arkansas (21); Newark, New Jersey (44); Linton, Indiana (29); Fitchburg, Massachusetts (40); and New Kensington, Pennsylvania (17)

employees at plant meetings and through supervisors' man-to-man contacts with employees. The communications grew in number during September and October. During that 2-month period a typical employee at some of the larger plants was exposed to well over 100 separate communications in one [5] form or another concerning matters related to the negotiations, and on many days he was subjected to at least 2 and sometimes to as many as 3 or 4. The last does not take into account oral communications by supervisors, as to the precise volume of which there is no specific evidence in the record.

[10] The communications were geared to the developing stages of the negotiations. This aspect of the case will be more particularly considered below as the course of negotiations and related events is reviewed. Broadly speaking, however, the communications prior to August 30—the date GE presented its offer—were primarily directed at conditioning employee [15] attitudes and opinions in the manner and along the lines earlier referred to. Following announcement of GE's offer, the employees were flooded with communications aimed at persuading them that the Company's package offer had been designed after careful research to meet their needs and that its acceptance was in their best interests. After passage of the IUE convention [20] resolution calling for a vote by locals on GE's offer, the same program continued, but the communications now stressed that the Company had gone as far as it could without jeopardizing the future of its business and the security of employees' jobs; that its final offer was now on the table with no more to come; and that it was its policy not to yield concessions because [25] of a strike or threat of

strike, regardless of the strike's duration. The General Counsel and the Union claim that at some plants the Union's communications went further and made statements and declarations of a coercive character to induce employee withdrawal of their support of union positions. But of all this, more, later.

[30] The communications, particularly after the negotiations recessed for the IUE convention, also unmistakably disclose an effort on the Company's part to undermine employee faith and confidence in positions espoused by the Union, by disparaging and attacking the motives of the IUE [35] top leadership, especially those of Carey. That tactic, as has been seen, was suggested as far back as November 1959 when "Communication Topics (Prior to Negotiations)" was drawn up. The Company's effort to discredit Carey actually began in muted tones even before the start of negotiations, and continued throughout its course, gradually mounting in intensity, reaching [40] a high point, thereafter maintained, when the negotiations recessed for the IUE convention. Through constant suggestions and adverse references, the communication sought to portray Carey as an irresponsible, self-seeking leader primarily concerned, not with the best interests of the employees, but with the furtherance of his own personal and political ambitions, and [45] therefore determined to lead the employees down the path of a job-destroying strike.

23

The Union also communicated with employees during the negotiation period, but, perhaps because it lacks GE's resources, not nearly on the scale the Company did, at least

as far as written communications are concerned.[20] In some instances the Union's written communications dealt [5] with bargaining issues, expressing sharp criticism of the Company's offer and of the Company itself and advancing arguments in support of the Union's demands. In the main, however, the communications, particularly those released on a local level, confined themselves to exhorting employees to maintain their union solidarity and not be taken in, intimidated, or [10] deceived by what they characterized as the Company's massive propaganda campaign directed at alienating employee support of the Union. So far as appears, the Union made no attempt, at least in written communications, to report to employees the daily course of negotiations, as did the Company. To what extent this may have been done through personal contacts [15] of local officials with union members or at local union meetings, the record does not show.

G. *The early meetings on the subject of employment security—July 19* [20] *to August 11*

On July 19, 1960, the GE and IUE negotiating committees, led by Moore and Carey respectively, met as scheduled to conduct early negotiations on the subject of employment security. Twelve meetings limited to that [25]

[20] The IUE has a biweekly newspaper, the *IUE News*, which goes to all its members, not just to those in the GE chain. The regular issues of the *IUE News* published during the early period of negotiations dealt only in small part with the GE negotiations. Stories relating to the GE [55] negotiations were, however, featured during the months of September and October. In addition, a special issue of the *IUE News*, released shortly after the IUE convention, dealt entirely with the GE situation. Constituent IUE locals in the GE chain also from time to time published material relating to the negotiations, mostly in the form of mimeographed [60] leaflets. Their number, however, was but a small fraction of the tremendous volume of literature GE put out at the same plants.

subject were held between July 19 and August 11, 1960. These meetings were later to be characterized in a GE publication as "listening sessions."

The first six meetings were devoted to the presentation and discussion of the Union's employment security proposals calling for [30] (1) establishment of a joint committee on automation; (2) limitations on overtime work while other employees were on layoff or working a short week; (3) limitations on subcontracting under similar circumstances; (4) the right of employees to move with their jobs transferred to other plants; (5) supplementary employment benefits (SUB); (6) separation pay—at the rate [35] of 1 week's pay for each year of service in excess of 2—for all employees laid off for more than 12 months.[21]

The Company criticized the Union's proposals as a whole, asserting they were directed primarily to the effects rather than the solution of the [40] problem of employment instability. The Company took the position, frequently reiterated, that the negotiators should approach the subject at hand, not through consideration of specific proposals, but by seeking to identify through persons having direct knowledge of the facts the "causes and sources" of employment instability at plant levels. Nevertheless, [45] during the course of the Union's presentation, the Company, in some instances only after considerable prodding by union negotiators, did discuss with the Union in specific terms the latter's demands, and declared its positions thereon.

---

[21] The existing contract already made provision for termination pay in the event of plant closings.

The Company opposed SUB largely on the basis of principle.[22] It expressed no position at all on separation pay, the only other item in the Union's demands, which, as the Company in effect conceded, would have involved substantial additional costs.

[5] As to the Union's proposal that employees be given the right to transfer with their work, Moore stated when that proposal was presented that he was unaware of any company policy that would bar an employee from following his work but that he wanted more information on local practices. [10] When the Union asked why it would not be possible to draft a simple understanding providing that employees should have the right to go to new plants with their jobs, Moore stated in effect the Company had studied and would continue to study that question, but that his only immediate concern was "to find the causes and sources" of the various employment [15] security problems. At a subsequent meeting, however, Moore stated that the Company was opposed in principle to the proposal as well as unspecified others because it was an invasion of management's rights.

GE opposed the Union's proposals for a committee on [20] automation, giving as its reason that such a committee could not solve the problem of employment stability. It also stated that no special committee was needed, as the local union could sit down with local management, utilizing the collective bargaining procedure, to discuss any specific

---

[35] [22] Although agreeing that unemployment compensation benefits in many States were inadequate and should be raised to 50 percent of average pay, the Company stated that as a matter of principle it believed that the situation should be corrected by amending State laws rather [60] than through contracts applicable to individual employers. It also stated that SUB costs added to the problem of job insecurity.

automation problems it might have. But the Company did not reply [25] when the Union pointed out that the national agreement made no provision for discussion of automation questions on a local level. Subsequently, when the Union suggested that automation committees on national and local levels might function outside the grievance procedure, the Company rejected that approach, terming it a "share the management" proposition.

[30] With respect to the Union's proposals for overtime and farm-out restrictions, the Company took the position generally that these were not appropriate matters for the national agreement but should be left for discussion by local unions with local managements. Significantly, however, [35] at a much later meeting, on September 27, in response to a question by the Union, the Company declared that it flatly objected to having the Union's noneconomic employment security proposals negotiated even on a local level as this "would get into the area of management rights."

[40] At various times in the course of the Union's presentation, the Company asserted that the Union had presented no constructive solution to the problem of employment security. The Union requested GE to present its own solution, making it clear that it was not wedded to its own proposals. On a number of occasions the Union requested GE to place its [45] own employment-security proposals on the bargaining table prior to August 11, the date the early meetings limited to the subject of employment security were scheduled to end. Moore replied that the Company did not have a proposal written up and ready to put on the table. What the Company wanted to do first, Moore said,

was to explore the pros and cons [50] of what was needed and useful for employees. And toward that end the Company considered it necessary for the negotiators to have more information from plant sources identifying the "causes and sources of employment insecurity" and showing what had been done or could be done to alleviate them.

25

Beginning with the session of August 2 and continuing through six bargaining meetings ending on August 11, the Company made its presentations. At the first 5 meetings, the Company brought in some 10 employment relations managers from as many plants who, on the basis of [5] previously prepared texts made presentations concerning the employment situations at their respective plants. Generally speaking, the presentations dealt with the extent, if any, to which employment instability was—or was not—a problem in the respective plants and with the measures which management itself had taken and was taking to stabilize employment through [10] manpower planning and other measures. In some instances the presentations also underscored how problems growing out of such factors as automation, "farm-out," overtime scheduling or transfer of operations were either nonexistent at the particular plant or had been eliminated or minimized through corrective measures or practices voluntarily undertaken by [15] management. Through its presentations, the Company also sought to point up that the causes of unemployment instability varied widely from plant to plant; that highly competitive market conditions were the most serious potential cause of employment instability; and that the solution to the problem was rooted in customers and sales.

[20] At the sixth and final session on August 11, the Company presented a detailed economic analysis, also from a previously prepared text, summarizing the factors affecting employment and unemployment in the nation as a whole and in GE in particular. The analysis pointed up, [25] *inter alia*, the serious and growing impact of foreign competition on GE's operations, the importance of attracting customers and sales to assure steady employment, the linkage between profits and job, and the operating measures GE itself had taken and intended to take to protect job security. The presentation also sought to show why GE's practices with respect to [30] subcontracting and overtime scheduling were desirable and in the long term interest of employees, and why any restriction thereon beyond those self-imposed by the Company would imperil employee job security.

Prior to making the August 11 presentation, Moore told Carey [35] that he was sure the Union would find the presentation "interesting" and "useful" because the Company planned to make it "a subject in the local communications in the future." All of the Company's presentations were thereafter printed in monograph form and released to ERMs at all plant locations with the suggestion that the ERMs make use of the material [40] in any way you feel that it can be helpful in your local situation."

Before the ERMs made their presentations, Moore had assured the Union that the ERMs would be ready to answer any questions related thereto. Nevertheless, the Company thereafter strictly circumscribed the area of [45] union questioning by refusing to allow the ERMs to express their views as to the desirability, feasibility or practicality of

applying the Union's specific employment security proposals to their respective locations. The union negotiators sought to extract such information on a number of occasions. Each time they were blocked either by Moore or by the ERMs [50] themselves. The Union was told that the ERMs had not appeared for that purpose and that only Moore could or would comment on the Union's specific proposals.

The union negotiators complained from the beginning that the [55] lengthy oral presentations from prepared texts were a waste of time. They stated that the material should be presented in written form; that the Company should submit its proposals on employment security; and that the remaining time scheduled for consideration of the employment security subject should be devoted to collective bargaining, which, the Union stated, [60] could only really begin after the proposals of both sides were on the table. With this the Company disagreed. It stated that the presentations being made were part of the process of collective bargaining. The information

being supplied by the local managers, asserted the Company, was needed by GE's national negotiators for fact-finding purposes. In point of fact, as the record adequately shows, although this was in part disputed by one company witness, the material contained in GE's presentation at the [5] bargaining meetings was already known to its negotiators, having theretofore been presented to them at a meeting of the plant ERMs held in New York about a week before the negotiations began.

At the close of the August 11 meeting, Moore read a statement [10] in which he declared, *inter alia,* that the Company did not have any part of its offer "actually in being," but that ". . . we sincerely believe that we should have some proposals in our forthcoming offer that are aimed at lessening—within limits available—the effects of [job] instability." When—as will later be seen—the Company did present its overall offer [15] at the end of the same month, the offer contained provisions related to the subject of employment security, more specifically, a program for retraining and reassignment and for income extension aid.

However, during the 4 weeks of early negotiations, the Company [20] gave no indication whatever of the employment security program which it eventually included in its overall offer, later presented substantially simultaneously to the IUE and other unions. The Union was thus afforded no opporunity to consider or comment on the Company's proposals during the sessions specifically set aside for the negotiation of an agreement [25] on employment security. The Company asserts that it said nothing of its forthcoming proposals on employment security because it had not yet decided upon its offer at the time. The evidence shows, to be sure, that the Company's overall offer was not *finally* decided upon until several days before it was presented.[23] But the record also shows that the Company's [30] eventual offer, although not finalized at the time of the early negotiations, had been in the process of

[23] This was questioned at the hearing by the General Counsel and the [40] Union. Both spent considerable time attempting to develop through cross examination of the Company's witnesses that the Company's overall offer was already finally settled upon and known to the Company's negotiators before the early negotiations began. Their efforts in that direction, however, fell short of the mark.

evolution for many months theretofore and had already reached an advanced stage of development by the time the early negotiations began.[24] And there is reason to believe that the Company's ultimate employment security proposals, even though not finally buttoned [35] down, were at least within the area of the Company's contemplation at the time.[25]

27

At any rate, it is quite clear that one of the Company's reasons for not having a proposal on employment security ready was that the Company *never intended to reach an accord on that subject during the period of early negotiations*, notwithstanding the understanding upon which the [5] early negotiations were entered into. Indeed, that much was virtually conceded by Thomas F. Hilbert, GE's labor relations counsel and one of its principal negotiators. Asked whether there was any reason why the Company did not have an offer in existence which could have been made during the month of discussion, Hilbert testified:

> [10] No, it is that we wanted to see what the Union had . . . and what the effects of our presentation on employment security were and then we wanted to go into other areas of discussion to get as full a discus-

---

[45] [24] In fact, by June 1960, the officers and other officials responsible for drafting the Company's proposal had already made two presentations to GE's principal executive officers and division general managers. Moreover, by that time, cost estimates on a companywide basis of the various alternatives under consideration had been prepared.

[50] [25] Moore conceded while testifying that during the period of early negotiations he had been thinking about at least one of the principal features of the income extension aid program later proposed. His only explanation for not mentioning it at all was that it "would be something less than high standards of negotiations to indicate [55] commitments on specific items." Moore's testimony elsewhere also discloses that during his trip around the GE circuit in early 1960, the subjects of retraining and reassignment and income extension aid came up as subjects of discussion with general managers.

sion as we could of [15] the elements of the Union demands.

This was stated in even more explicit language in one of the Company's plant publications issued the day after the early negotiations ended. The GE News published at Louisville, Kentucky, on August 12, 1960, after declaring [20] that the early sessions were only "fact finding sessions," stated:

> There was no intent on the part of the Company to reach an "agreement" or solution to this complex problem during the initial four weeks of talk.

[25] GE utilized the early negotiations as a springboard from which to present directly to employees its views on the employment security issues. This was done through teletyped accounts of the meetings that were used in turn by plant ERMs as source material for transmittal to employees [30] via the plant communication channels. The teletyped accounts were onesided; the positions of the Company were extolled and those of the Union either not mentioned at all or mentioned only to be deprecated. On several occasions, the Union at the meetings complained about the incompleteness of the reports made to employees, but to no avail. The [35] presentations made by plant ERMs to the national negotiators were in some instances also communicated to employees at the particular plants covered thereby. At least at one plant—Bridgeport—this was done orally at a series of informative employee meetings. The principal points stressed in the communications were that the Union's proposals could not solve the [40] problem of employment instability; that this could be done only through customers and sales and through the Company's own voluntarily undertaken efforts to correct the causes

of employment instability. The monograph based on the August 11 presentation was also widely used as source material in plant communication media for the purpose of impressing the Company's [45] arguments directly upon employees.

In his brief, the General Counsel in effect requests a finding that the Respondent entered upon the first 4 weeks of "negotiations" without any intent of negotiating on the subject of employment security [50] in the sense agreed to on July 18, but rather with the intent of utilizing the occasion for the two-fold purpose of (1) impressing upon employees that it was genuinely concerned with the problem of employment security and was working hard to alleviate the sources and causes of that problem, and (2) presenting to employees, more than to the Union, its position and [55] arguments on the employment-security issues involved in the negotiations. The totality of circumstances present in this record validly supports, I find, an inference to that general effect.

28

H. *Meetings on Union's general demands, prior to submission of GE offer, August 16 to 25*

[5] Six meetings were held between August 16 and 25. The Union presented its justifications in support of its demands for a union shop, revisions of noneconomic terms in the national agreement, improvements in the pension and insurance plans, a general wage increase, improvements in vacations and holidays, and other proposed contract changes not [10] covered at the early employment se-

curity meetings. GE took the general position during these meetings that it was interested in ascertaining the facts on which to base its determination of what should appropriately be included in its offer. GE, however, did not decline to discuss the Union's demands. As to many of the demands, principally in the area of [15] noneconomic contract changes, GE declared a position. It was almost invariably one of rejection. GE gave as its reasons for rejection, in the case of the union shop, that it was opposed to this on principle, and in the case of other changes, that they were either too costly, or would be too difficult to administer, or would deprive the Company of flexibility. [20] As to other union demands, GE indicated that it was not satisfied with the Union's presentation and needed more facts and justifications. In a few instances, such as the Union's requests for weekly instead of biweekly dues deductions and for an added holiday, the Company stated that it would "give consideration" to the Union's proposals. The Company refused, [25] however, to commit itself as to any of the demands, declaring that it did not engage in bargaining on an item-by-item basis, although it did regard itself as obliged to go through and consider the Union's demands *seriatim*.

[30] During this period GE did not submit any proposals of its own. While leaving no doubt that the Union's economic demands were unacceptable to it, GE declined to give any indication of what it was *affirmatively* thinking on the subjects of wage increases, pensions, insurance, or other economic benefits, except to make clear that it intended to eliminate the [35] cost-of-living escalator.[26] GE

[26] During this period, the Company cited the Union's election to terminate [60] the then current contract as a justification for its decision to eliminate the escalator clause. Subsequently, the Company agreed that that was not the true reason for its decision.

stated that it was still attempting to assemble a common body of facts as a basis for negotiation and that its position on all issues would become known when its offer was eventually prepared and presented.

[40] At various times, the Union asked GE to declare itself on how much it had available for its entire package so that the Union might suggest how it desired the available amount to be apportioned among the various economic benefits it sought. Although the Union indicated that it might be prepared to modify or rearrange its original demands accordingly, [45] GE chose to ignore that request. GE, in turn, sought to have the Union declare itself on the order of priority it gave its various demands, but the Union refused to do so, stating at that point that all its demands were "musts."

[50] On a number of occasions during this period, the Union requested information. But its requests were either ignored or brushed aside. Thus, on August 18, during a discussion of the Union's proposal to eliminate certain deductibles from insurance benefits, Swire, the Union's pension and insurance expert, asked Willis, the Company's benefits [55] specialist, the cost to the Company of eliminating the deductibles. Willis replied that he did not have the figures. When Swire asked Willis to confirm

a figure of one-half cent per hour, which Willis had assertedly used in a speech, Willis stated, "I don't talk in figures." But later when the Union's pension proposals were being considered, Willis objected to them on the ground: "They will cost a lot." On August 24, during a

discussion [5] of the Union's proposal for a fourth week of vacation for employees with more than 20 years' service, the Union asked the Company for figures on the number of employees falling within that category. The Company stated that it did not have that information. In point of fact, as will later appear, that information could have been obtained by it. Again while the [10] Union's sick leave proposal was the subject of the discussion, the Company termed the Union's demand an "expensive" one. But it made no reply when asked for its estimate of the cost.

At the end of the six bargaining sessions, the parties were no [15] nearer agreement than at the beginning. The Union charged the Company with stalling. Declaring that it was not there for educational purposes and that negotiations did not really begin until the proposals of both sides were on the table, the Union urged the Company to come forward with its offer.

[20] In the meantime, GE's plant communications program continued along the lines earlier stated, with constant reiteration of its arguments concerning competition, sales and profits and the dependence of jobs on GE's ability to keep its costs down. In anticipation of the Company's [25] forthcoming proposal, the communications now also restated GE's declared bargaining policy. They stressed the careful research and other practices that GE engaged in to assure that its offer would be "right," its fair, firm offer approach, its unwillingness to engage in haggling or horsetrading, and its refusal to make concessions beyond what it believed to be [30] right because of a show of belligerence by union officials. The communications during this period also criticized the Union's demands and the

Union's concept of collective bargaining. The Union was accused of being disinterested in facts. Its unwillingness to rank its bargaining demands in the order of their priority was particularly scored.

[35] I. *August 29 and 30: GE presents its offer to the Union*

In the evening of August 29, Carey and Callahan met with Parker [40] and Moore for a dinner meeting, at Moore's request. The purpose of the meeting was to give the IUE representatives a preview of the offer which Moore stated GE planned formally to present the next day to the IUE and to the UE and thereafter to some 100 other unions. Moore read a summary of the Company's offer from notes, stating that no written copy was then [45] available. The offer which Moore outlined on August 29 was formally presented to the IUE in writing at a regular bargaining session the following day. The proposals provided in substance for the following:

1. *Contract duration*: October 2, 1960 to September 29, 1963.

[50] 2. *Wages*: 3% increase effective October 2, 1960; 4% increase, effective April 2, 1962; no cost-of-living escalator.[27]

3. *Retraining and Reassignment*: Local management at its [55] discretion may offer an employee having 3 years or more service a retraining or reassignment opportunity in another job at 95% of the job rate of his former job in

[60] [27] The Union's proposal had asked for annual productivity increases of 3½ percent and for continuance of the escalator clause.

order to equip the employee prior to any layoff for another job requiring other skills. The period of training would not exceed one week for each year of service. Disputes would not be subject to arbitration.[28]

[5] 4. *Income Extension Aid*: This made available for an employee with 3 or more years service and not eligible for optional retirement a fund equal to one week's pay for each year service for use in the event of layoff or plant closing. [10] The fund could be drawn upon under 4 options: (a) as payment for tuition while attending a recognized school during a period of layoff to train for another job; (b) as a lump sum payment available to the laid-off employee provided he elected within 60 days after his layoff to [15] terminate his employment and forego recall rights and service credits—but this option was available only if management determined the layoff would exceed 6 months; (c) as weekly income at the rate of 50% of normal pay if the laid-off employee remained unemployed after exhaustion of State [20] unemployment compensation benefits; or (d) as a lump sum

[35] [28] The Union had not asked for this "employment security" provision. The Company had never mentioned it as contemplated at any of the earlier negotiating meetings. The Company originally proposed to insert the "R & R" provision as well as the Income Extension Aid provisions in the [40] Pension and Insurance Agreement so as to make clear that disputes arising thereunder would not be arbitrable. Later in the negotiations, however, the Company agreed that these provisions might be put in the National Agreement, with the express understanding, however, that arbitration procedures would not extend to them. The Respondent in its brief points [45] to this as a "concession," but it is quite clear that the transfer did not involve any substantive change.

payment on plant closing—the last option modifying and superseding a provision for termination pay on plant closing contained in the 1955-1960 agreement.[29]

[25] 5. *An Emergency Aid Plan*: Exclusively under management control, providing for loans or grants not to exceed $500 in serious emergencies. This plan was not to be effective at any IUE location until all existing local Relief and Loan plans were liquidated.[30]

[30] 6. *Pension Plan improvements.*[31]

7. *Insurance Plan improvements.*[32]

31

8. *Contract changes:* The Companys proposal contained 3 items: (a) to allow local negotiations on the subject of weekly checkoff; (b) to allow local unions and local

---

[29] The "IEA" was new. It had not been discussed with the Union in prior negotiations. The only thing in the Union's proposals resembling it in part was the Union's demand for separation pay for employees with 2 or [50] more years' service who were laid off for more than 12 months. The Union's SUB demand involved a different concept.

[30] A number of IUE locals had such Relief and Loan plans which were controlled by the employees or under a joint arrangement with management. This proposal was neither requested by the IUE nor desired by it on the [55] condition stated.

[31] The Company's proposal contained some six improvements in the Pension Plan. Three involved changes which did not reflect any proposal made by the Union, one involved a change substantially as proposed by the Union, and two reflected in part union-proposed changes. The proposal in effect [60] rejected other changes the Union had proposed.

[32] Here, too, the Company's proposal contained some six improvements. At least two concerned items not raised by the Union. Only one was precisely in the terms proposed by the Union, amount of benefits aside. [50] The Union's basic proposals were rejected. John Morris, a company consultant on insurance costs, testified that the improvements proposed by the Company were basically different from those proposed by the Union, "an entirely different scheme of things."

managements to negotiate to substitute a different [5] holiday for any of the listed ones; (c) to allow death in family time and jury duty time to be considered as time worked for purposes of qualifying for holiday pay; and (d) to increase maximum leave for Union officials from [10] 5 to 8 years.[33]

At the August 29 informal meeting, Carey and Callahan expressed themselves immediately as being opposed to the company offer, protesting that it was not responsive to the Union's proposals. The union representatives voiced their strong disapproval, among other things, to the Company's [15] elimination of the cost-of-living escalator provision, commenting that a 3-year contract without escalation and without opportunity to review wage trends was wholly unacceptable. Moore at once asked what they thought would be an adequate provision on that point. They wanted a continuation of the escalator clause, the union representatives replied. Moore then [20] asked whether the Union would consider a wage reopener during the 3-year contract term, at the same time making it "plain," as appears from his testimony, that he "was not offering [the reopener] at that meeting because it was not a bargaining session." The Union did not respond to that [25] suggestion, expressing neither approval or disapproval.

Carey asked the Company to refrain from presenting its offer to the IUE negotiating committee the next day,

[33] As to (a), the Union had asked for weekly dues deduction at the request [55] of a local without further negotiation; as to (b) and (c), these had not been specifically requested by the Union at all; as to (d) the Union had requested elimination of the 5-year maximum on total leave for union officials. These items were all of a relatively minor nature as compared to many other more basic requests for contract [60] changes which the Union had requested and which were rejected.

and also to withhold its release to other unions and the press. To do so, Carey said, would tend to "freeze" the Company's position and place it on a collision course. [30] Carey urged that before the Company became publicly committed to its offer, there should be further discussion by those present to see what could be done about changing the Company's proposals to make them more acceptable as a basis for negotiations. The Company's representatives rejected Carey's request. They said they did not consider that meeting a proper [35] place to discuss the Company's proposals, as it was not a formal negotiating session, only a courtesy preview meeting. The offer they had come up with, they said in substance, was the product of great effort, extensive research and surveys and careful consideration of all relevant factors. The Company considered it the best offer it could make in the balanced best [40] interests of employees and everyone else concerned, and one, moreover, that the union representatives could "sell." This was the offer the Company was going to make. And the plan to present it to the IUE and the UE the following day would not be altered. They would, however, withhold public announcement and presentation of the offer to other unions until the full [45] IUE negotiating committee had had an opportunity to consider it and give the company negotiators some feel as to whether agreement was imminent.

32

At the negotiating meeting on August 30, the Company formally presented its offer to the IUE negotiating com-

mittee.[34] Immediately following the reading, Moore announced that the Company was including in its offer an option to reopen the contract on April 1, 1962, for wage [5] negotiations with no commitment for a further wage increase at that time, as an alternative to the proposed second phase wage increase effective that date.

Carey again decsribed the Company's proposal as unresponsive. [10] He proposed that the next 3 days be spent negotiating without the pressures and glare of publicity, with the company offer serving as a basis for discussion. And he again urged Moore not to publicize the offer and thereby freeze the Company's position. Moore responded that the Company had not held back anything, and that its proposal was not just the first [15] of a series that would be put on the table. The Company, Moore added, felt that the employees should know what was on the table.[35] Moore stated, however, that if the Union

[34] During the reading of the Company's offer, a union negotiator asked [35] Moore whether the existing 10 percent cost-of-living adders were being incorporated in the base rates. Moore replied, "We haven't decided yet." There is only one other reference throughout the negotiation minutes to the cost-of-living adders. That appears in the September 7 minutes in the form of a peripheral and somewhat obscure colloquy in which, as [40] nearly as I can gather, Moore disclaimed an intent at any time not to carry over into the new proposed contract the 10 percent cost-of-living adders. To have excluded the adders quite obviously would have resulted in a 7 percent immediate reduction in employees' pay rather than in a 3 percent increase as represented by the Company to the Union and in [45] its communication to employees. Notwithstanding Moore's above-quoted remark, I think it clear that the Company never seriously contemplated excluding the adders. The comments made here are relevant only because the Respondent in its brief—relying solely on the August 30 and September 7 colloquies above referred to—lists the ultimate inclusion [50] of the cost-of-living adders in the base rates as a change made in the Company's original offer as a result of subsequent negotiations. I find this to be inaccurate.

[35] In a subsequent teletype to ERMs in the form of a suggested letter to employees, Carey's request for a 3-day news blackout was criticized, the [55] Company declaring that it was unwilling to hide facts from employees.

wanted more time to consider the proposal, the Company would hold up its release until the following day.[36]

[20] At the opening of the session on August 31, the Company announced that its offer was being released to the plants.

J. GE presents its offer directly to employees

[25] On August 29, prior to the offer preview meeting that evening, the Company had held a meeting of its plant ERMs in New York. The ERMs were each given a package consisting of a script of a tape recording discussing GE's 1960 proposal; reproductions of slides to be used in [30] presenting that proposal to employees; copies of GE's offer letters to IUE and UE and a form of GE's offer letter for unions other than IUE and UE;[37] a series of questions and answers about GE's proposals; a copy of

a GE News Special Edition describing the 1960 program in detail; a model newspaper ad designed as a report to GE plant communities concerning the contents and virtues of the GE 1960 proposal; and a document entitled "Communications Program Information." The last mentioned document adverted [5] to the foregoing materials and other materials to be supplied, including daily bulletins to be distributed to employees highlighting various features of

[36] Other aspects of the August 30 meeting will be treated in the subsection below dealing with the general course of negotiations between August 30 and September 8.

[37] The offer letters to the IUE and to other unions were identical so far [60] as the economic offer was concerned, with immaterial exceptions, even to the statement in the last paragraph that "certain elements of the offer reflect our acceptance of concepts proposed by your bargaining committee."

the offer, letters to employees' homes emphasizing the significance of the offer, press releases and radio and television messages. It also contained recommendations as to the use of the materials "to help [10] the components inform their managers, supervisors, employees and others regarding [GE's] offer." It was suggested, *inter alia*, that a copy of the script be given to all supervisors "so that they will be prepared to answer questions raised by employees regarding any point made in the presentation."

[15] The script, entitled "General Electric's 1960 Proposal for Job Opportunity and Better Security,"[38] set forth and explained the Company's proposal in detail, pointed out and acclaimed the advantages to individual employees of the various features of the proposal, and sought to demonstrate [20] how the proposal so met the various needs of the employees as to obviate any reason for a "long pay-losing strike in order to get the things you want." In addition, the script expressed the Company's concern over the problem of job insecurity; spoke of the 2 years thorough research (including the early negotiations) in which GE had engaged to determine what makes for job [25] security; stated the conclusions that had been drawn therefrom (repeating in substance the major points contained in its presentations at the early negotiations); deprecated SUB as a solution;[39] and pointed out how its proposal had been designed to do the things its study showed could be done to help build job opportunities and better security for employees and was [30] therefore responsive to the

[551] [38] Elsewhere advertised as GE's 1960 "Jobs program."

[39] "Even those who advocate such programs as Supplemental Unemployment Benefits realized, and publicly admitted, that such programs really did little or nothing to make jobs more secure."

needs and desires of the employees. With respect to the proposed pay increases, the script stated that they were "good increases" considered in the light of recent settlements by other companies and the "other particularly expensive benefits" in the security provisions of the proposal. The total package, the script went on, while [35] worth enough to bring real gains to all employees, nevertheless was "not so costly as to put the Company in an impossible competitive position, thus endangering the jobs of *all* employees." In conclusion, the script urged employees to "consider the proposals carefully . . . discuss them with your families—decide whether this is a program you want —and then advise your [40] union representative of your decision."

In one respect, the Company's explanation of the offer was inaccurate and misleading because of the omission of a material fact. Describing the Income Extension Aid feature, it stated:

> [45] If within 60 days after being laid off, an employee decided to voluntarily terminate his employment, he could immediately collect the total amount available to him in a lump sum along with backpay, vacation and other allowances due him.

[50] The Company's offer is explicit that the termination pay would be given only where the Company was of the opinion that the employee would not be recalled within 6 months after the date of his layoff, and provided further that the

employee must abandon his recall rights. This was not an isolated instance of this omission. It is found frequent-

ly repeated in other employee communications where the features of Income Extension Aid program are described.[40]

[5] Beginning about August 31, 1960, ERMs or other responsible plant officials at most of GE's plant locations conducted meetings of employees, usually in small groups, at which they either played the tape recording or read the script of the prepared statement relating to GE's proposal, [10] utilizing the slides in conjunction therewith. The presentations were made on company time and property or at premises rented by the Company for the occasion.[41] At some of the plant meetings, the plant officials added to the prepared script comments of their own, either on their own initiative or in response to questions from the floor, explaining in some instances [15] why the Company could not grant certain union demands desired by the employees.[42]

---

[40] Indeed, the 6-month layoff condition appears to have been mentioned in [30] only one of the numerous employee communications adverting to the IEA program. Short reference to it appears in the questions and answers distributed to ERMs and thereafter published at many but not all GE locations where the script above referred to was presented to employees.

[41] In some instances, local union officials were notified in advance of [35] the Company's intention to hold the presentation meetings. But even where they objected—as the record shows at least one did on the ground the Company was bypassing the Union and engaging in direct bargaining with employees—their objections were ignored.

[42] The General Counsel called employee witnesses from some 10 plants in [40] an effort to establish that in the course of such comments the officials also declared that the offer made to the Union was a *final* one and the *only* offer the Company would make, adding in some instances that no amount of negotiation could bring a better one. The testimony of the General Counsel's witnesses was met in many but not all instances by [45] contradictory testimony from witnesses called by the Respondent. Cross examination of the General Counsel's witnesses developed in substantially every instance either admissions rendering questionable the validity of the witness' testimony on direct, or, as was more often true, evidence of a likelihood that the witnesses in their recollection had [50] confused statements assertedly made at the offer presentation meeting with statements subsequently made either at other em-

(Footnote continued on following page)

Intermediate Report.

Following the offer presentation meetings, wide use was made in employee communications of the GE News Special Edition, questions and [20] answers, daily bulletins, letters to homes, and other materials as suggested in the communications program given ERMs at the August 29 meeting.

The Company's contacts with employees relating to the offer were not confined, however, to the plant meetings and written communications. [25] At numerous locations, plant management, through letters and other communications, invited and encouraged employees to discuss with their

35

supervisors or other management representatives any questions they might have concerning the offer in general or its impact on them as individuals. At one plant (KAPL) the employees were provided with a telephone number—that of the plant ERM—which they were urged to call for answers to any [5] questions they might have about the offer. At GE's Pittsfield plant—one of its largest—the plant ERM conducted a series of roundtable meetings to which employees were invited for the purpose of asking questions and discussing the offer with the ERM. Documentary evi-

(Footnote continued from preceding page)

ployee meetings or in written employee communications. This was as much true in the case of the General Counsel's witnesses whose testimony was not met by specific denial as it was in the case of the others. The confusion of [55] the General Counsel's witnesses is perhaps readily understandable in the light of the barrage of communications to which the employees were subjected throughout the negotiation period. But this does not help the General Counsel. Without further belaboring the point, suffice it to say that I am not persuaded that the General Counsel has established [60] with sufficient reliability that company officials in their added comments at the "offer" meetings made the specific "finality" declarations referred to above.

dence reflects that the ERM did not confine himself to explanations of the offer, but also [10] presented economic and other justifications for positions taken by the Company.

Moreover, the record reflects that GE supervisors were expected both to impress upon employees the merits of the offer and to ascertain [15] employee reactions thereto. Thus, for example, a teletype from GE headquarters to plant ERMs, dated September 1, sets out "pointers that you and other supervisors might find handy while talking to employees about the soundness of our proposal." There is also in evidence a management newsletter, dated September 7, 1960, to all managers and supervisors at the [20] Holyoke plant, mentioning "some additional points that should be stressed by supervisors" in their contacts with employees.[43] Also in evidence is a memorandum dated September 6, to section and subsection managers at the Schenectady plant, stating, *inter alia:*

> [25] Individual departments have been charged with the job of getting maximum possible understanding of the offer among employees . . . We would appreciate receiving indications of reactions among your employees regarding the contract proposals. There may be misunderstandings. Perhaps there [30] may be benefits that are desired and are not included in the offer, or there may be strong reaction either positive or negative to the offer. Please jot down this information and forward it to the Communications Office.

[43] The supervisors were told to stress, *inter alia*, that the Company had not really eliminated cost-of-living escalation but had factored it into the second phase wage income; that this approach was beneficial to [60] employees because wages could not go down; that it was also in keeping with the recent trend of contract settlements and designed better to solve the problem of inflation.

[35] In addition, one of the Respondent's witnesses, a subsection manager in the Philadelphia plant, testified that a general meeting of supervision had been held at his plant on August 31 to familiarize supervision with the contents of the Company's offer so that they could communicate with employees concerning it. The record reflects similar supervisors' meetings [40] were held at other plants, at Lynn, for example.

The General Counsel called a number of witnesses to show that supervisors initiated discussions with employees both to sound out their reactions to the company offer and to endeavor to persuade them that the [45] offer was one that should be accepted. The testimony of these witnesses, to the extent credited, and as supplemented in some instances by responsive testimony of supervisors involved, shows the following: In *Philadelphia*, on the afternoon of the offer presentation meeting, a foreman questioned an employee as to his reactions to the offer. When the employee declared [50] his dissatisfaction with certain aspects of the offer, the foreman said he thought this would be the only offer. Several days later the same foreman asked him whether he had changed his mind about the proposal. Another foreman told another employee that the offer was a good one, [55] stressing that it would be foolish not to accept it, as a strike would cause

the plant to lose work and jeopardize future job security.[44] A subsection manager, several days after the "offer meeting," sounded out an employee's reaction to the offer, stating, after the employee had declared it inadequate,

[45] [44] The record does not clearly reflect the precise date of this conversation.

that the Company's offer was the product of careful research [5] and was fair and reasonable; that there was not room for more within the Company's ability to pay; and that nothing further could be gained by going out on strike.[45] The same section manager admitted that he as well as other supervisors under him spoke to other employees about the offer and sought to sound out employee reaction thereto. In *Newark,* an [10] employee steward was told by his general foreman on one occasion, and by the plant labor relations manager on another, that the Company's final offer was on the table and it was foolish for employees to go out on strike as a strike would not result in a better offer. These statements were probably made in the latter part of September. In *Pittsfield,* the manager of union [15] relations on three separate occasions in September approached a union steward, to whom he had never spoken before, to inquire about employee reactions to the proposal. When the employee indicated on the second and third occasions that he was still opposed to the offer, the manager stated that a strike could result in the loss of Government contracts and consequent loss of [20] employee jobs. The manager also stated on the third occasion that the company offer was final and there would be no change.[46] The manager conceded that he spoke to other employees to the same effect.

[45] The subsection manager admitted having a conversation with the employee about the offer, but denied making certain statements attributed to him. His denial, to the extent inconsistent with the finding made above, is not credited. [50] [46] The manager, who testified, did not deny these conversations. He testified, however, that the last conversation, in which the finality of the offer was mentioned, occurred in the latter part of September after a statement had come out from New York to that effect. His testimony in that respect is credited.

At various times during the negotiations, union representatives [25] complained, but to no avail, about the Company's "propaganda blitzkrieg" directed at employees, accusing GE of bypassing the Union and seeking to deal with employees directly. With specific reference to the Company's plant offer presentation meetings, the Union asked for equal time, and for permission to address the employees under the same conditions utilized by [30] the Company. The Company refused, declaring "Get them over to the union hall and you can talk to the employees."

K. *Negotiating meetings August 30 through September 8*

[35] There were seven negotiating meetings between August 30 and September 8. The Union during this period indicated a willingness to drop or scale down some of its demands, particularly in the areas of contract changes, pensions and insurance, but continued to press for its major [40] demands, including the union shop, a 3½ percent annual wage increase (as opposed to the slightly more than 2 percent offered by the Company), continuation of the cost-of-living escalator, SUB,[47] an added holiday

and an extra week's vacation for employees with more than 20 years' service. The Union also sought revision of the Company's Retraining and Reassignment proposal to

[55] [47] As to SUB, however, the Union modified its original demand to integrate it with the Company's Income Extension Aid proposal. It accepted the principle that a fund be made available for each employee at the rate of 1 week's wages for each year of service over 3, but proposed that the fund be used as a source of supplemental unemployment compensation [60] benefits, with any balance to an employee's credit remaining available for termination pay.

assure the protection of employee seniority rights.[48] Even with respect to the foregoing stated demands, however, the Union indicated [5] near the close of this series of sessions that its position was flexible.

The Company declared that it had a fixed position on cost-of-living escalation, SUB and the union shop, but that it viewed other union demands as within the "areas of collective bargaining." At the same time, the [10] Company made it quite clear, however, that it was willing at most to consider only such changes as were within the framework of its proposals. On various occasions, the Company indicated that it had not granted certain union demands because it had put such money as it had available into improvements which it had determined from its own research would best meet [15] the employees' needs and desires. The Company summarily rejected all union suggestions for revisions entailing added costs, frequently citing that consideration as the basis for its rejection.

The Union unsuccessfully sought to ascertain from the Company [20] the estimated cost of the company offer. It explained that it wanted the information so that it might

---

[45] [48] The Union expressed concern that the R & R provision could be utilized by the Company as a means of impairing or circumventing employee seniority rights. The Company disclaimed any such intent and explained that its R & R proposal contemplated the negotiation of local supple- [50] ments which would define the manner of selecting employees for retraining and reassignment. Subsequently, the Company submitted a more detailed draft of its R & R plan, which stated, *inter alia*, that local management would take seniority into consideration as "an important factor" in selecting employees for retraining. Throughout, [55] however, the Company made it clear that any grievance arising out of the R & R program, unlike other seniority grievances, would not be subject to the contract's arbitration procedures. The Union considered this inadequate protection of employee seniority rights, and continued throughout the negotiations to oppose the R & R proposal as submitted, [60] principally on that basis.

be able to tell the Company how it wanted the available money allocated among different items. Moore stated that the Union had no right to decide what was best for the employees, and also said that he did not know the cost of the Company's proposal "because it hasn't [25] occurred yet." Asked more specifically whether the Company's offer would cost less than 9 cents an hour, Moore said the Company had not put a figure on its package. When the Union insisted that the Company must have estimated the cost of its proposal before submitting it, Moore denied having any such estimate. "GE works on a level of benefits basis, not [30] the cost per item," he declared. Actually, as the record shows, the various items in the Company's proposal had all been cost estimated by management representatives on a companywide basis prior to its release.

The Company during this period similarly rejected, ignored, or [35] brushed aside union requests for cost or other information relating to specific items in issue. Thus, for example, the Company resisted the Union's request for an added holiday and an extra week's vacation for employees with more than 20 years' service on the ground that it would add to the Company's cost. But when the Union asked for the number of employees [40] who would be affected by the vacation proposal so that it might itself compute the costs, Moore, shifting ground, stated in effect that such data was irrelevant because the Company "discussed the level of benefits." The Company took a similar position with respect to the Union's request for

cost information in the area of pensions and insurance.[49] The Company likewise refused cost information relevant to the Union's revised SUB demand.[50] When the Union on September 8 asked how many people would have benefited by Income Extension Aid on the basis of the Company's layoff [5] experience over the past 2 years, Moore responded, "Somewhere between zero and 100 percent." Later, however, when Carey persisted in his demand for this information, Moore told him to make the request in writing. As will later appear, the Union did thereafter submit such a written request, but the Company did not supply the Union with the information until after [10] the strike was over when it no longer could do any good.

In other respects also, the Company registered impatience with the Union's efforts to have it justify bargaining positions it had taken. Thus, on September 6, after Moore summarily rejected the Union's principal [15] justification for a 3½ percent annual productivity increase, declaring "there is no direct relationship of productivity to wages," Lasser for the Union asked Moore to state the factors that had influenced the Company's wage offer. Moore replied vaguely, "Many other factors, other settlements, competi-

[49] For example, during a discussion between the Union's benefit expert [40] (Swire) and the Company's benefit expert (Willis) relating to a union-requested improvement in maternity benefits, the following colloquy occurred:

Swire: We are asking for an improvement in maternity. We want the Company to pay [45] everything up to $500, then co-insurance after that.

Willis: Something like that is out of reach. Maternity is the most expensive item.

Swire: What does it cost, Sid?

[50] We talk level of benefits, not costs.

[50] As noted above, the Union suggested SUB as a substitute for Income Extension Aid, to be financed in the same way by a fund for each employee equal to 1 week's pay for each year's service. The Company objected to this proposal on the ground that it would come to 2 percent. But, when [55] Carey sought to ascertain for comparative purposes the cost of IEA, suggesting 1 percent as a likely figure, Willis refused to say, stating, "We haven't figured it out yet."

tion, etc." But when asked for further explication, particularly [20] with respect to a comparison of the Company's wage offer with those in other settlements, Moore evaded a direct reply. After lunch that day, Lasser asserted that the Company's offer was inferior to other settlements according to the Union's information. He asked Moore to disclose specific information with regard to the other settlements on which the Company relied. Moore [25] declined to do so, stating that the information was in the "public domain" and that Lasser should have prepared himself before coming to the meeting. On the following day, when Lasser again sought to ascertain the Company's reasoning behind its wage offer, accusing Moore of having evaded an answer the preceding day, Moore again declined to be specific, stating, "The wage [30] increase justifies itself." He further declared, "We bargain on what is the appropriate thing to do and the level of benefits."

Throughout the period in question, the Company adhered firmly to its offer as presented to the Union on August 30, except for its clarification [35] relating to retraining, noted above, and except also for the early signing bonus proposal to be referred to shortly below.[51] Other than as stated,

---

[51] The Respondent contends in its brief that during this period, it changed its offer in some five respects. But this contention does not withstand [60] the test of scrutiny. One of the alleged "changes"—the inclusion of the reopener provision—formed part of the August 30 offer, and was, moreover, never requested by the Union. Three others— [50] inclusion of the cost-of-living adders to the base rate and the transfer of the R & R and IEA provisions from the Pension and Insurance Agreement to the National Agreement have been adverted to above. As has been seen, these did not involve any actual changes

(Footnote continued on following page)

the Company at the bargaining sessions here under consideration, indicated a disposition toward flexibility only in one regard—the substitution of holiday and vacation improvements for part of the proffered wage increase. The facts as to this will be related in the succeeding subsection of this [5] report.

At the September 8 meeting, the Company announced that as a bonus for early acceptance it would make the 1960 wage increase effective on the Monday of the week the new agreement was signed instead of on [10] October 2, 1960, as originally proposed. At the same time the Company pointed out that it was making the same bonus available for other unions. No such change in the Company's offer had ever been requested by the Union. When the offer was made, Moore indicated that he did not expect the Union to accept it because "you are going to the convention." One of the tacks [15] thereafter taken in the Company's communication program was that the IUE leadership, by deliberately "stalling" negotiations because it assertedly wanted a strike, was depriving employees of the advantages of an early settlement.

[20] The parties agreed when the IUE-GE negotiations were originally scheduled that there were to be no meetings between September 8 and 20 because of the conflicting

(Footnote continued from preceding page)

at all. [55] The fifth—the Company's assurance that seniority would be considered a factor in selecting employees for retraining—also adverted to above—was by the Company's own account not a change but simply a clarification of the Company's original position. Moreover, it failed to meet the Union's basic objection that without arbitrability of grievances employee [60] seniority rights could not be adequately safeguarded. Another change—the so-called Exclusion K modification—is placed by the Respondent in a later period although it more likely occurred during the early September meetings. That change will be considered in a subsequent subsection of this report.

IUE convention. Nevertheless, on September 8, the Company suggested the continuation of negotiating meetings during the convention period. In a "Dear Employee" letter teletyped that day for use [25] by ERMs, as well as in subsequent employee communications, the Company made capital of the "cold reception" it received to its suggestion for continued meetings. Neither that letter nor earlier communications mentioned, however, that on August 31 the Union had asked for meetings 5 days a week but that the Company had then declined to modify the original schedule. [30] Nor did the letter mention that on August 31, Callahan had suggested extra meetings beginning on September 19.

[35] L. *The Revision of GE's Offer to Include Holiday-Vacation Options*

After the Union made its offer, several members of the Union's negotiating committee from old line plants mentioned the importance which employees at their locations attached to the Union's demand for an added holiday and for a fourth week of vacation for 20-year service employees. [40] The Company indicated its interest in that demand from the outset and indicated a willingness to listen to any "within-the-framework" proposal the Union might have relating to vacations and holidays. The Union's negotiating committee, however, continued throughout this period to insist that the holiday and vacation improvements be *added* to the offer. In the [45] meantime, the Company through its two-way employee communication channels began to get "feed-backs" of employee reactions to its offer. These indicated that among employees in old line

plants the holiday-vacation demand was a matter of special concern and that there was considerable interest among such employees in working out an eighth holiday and fourth week of

40

vacation in lieu of part of the wage increase. On September 7 and again on September 8, the Company invited a proposal from the Union to have holiday and vacation improvements substituted for part of the wage increase.[52] But the Union stated bluntly that it was unwilling to consider [5] any such substitution, explaining that it regarded the wage offer too low as it was. That was where the matter rested when negotiations suspended for the IUE convention on September 8.

Notwithstanding the Union's clearly expressed position on the [10] subject, Moore, on the morning of November 9 telephoned Callahan at his home to advise him that the Company was offering the Union the option of substituting an additional holiday and a fourth week of vacation for employees with 25 years' service in exchange for 1 percent of the 4 percent wage increase proposed to take effect on April 2, 1962. Moore then also [15] declared or at least clearly intimated that the option might also be taken by the Union on a local-by-local basis.[53] The Company at

[35] [52] On September 7, also, Moore, following up a remark by the Schenectady delegate, indicated the Company's amenability to having this worked out on a local option basis. But Callahan, the IUE-GE Conference Board [40] Chairman, made it clear that the Union bargained nationally and was not interested in local options.

[53] On this point there is a slight variance between Callahan's and Moore's testimony. Callahan testified that the local-by-local option was unequivocally offered at the time. Moore, on the other hand, testified [45] that he said the Company was "thinking about a local by local option," but that he did not actually make that offer until some time later.

about the same time also revised its offer to other unions to provide for the same option.[54] The informal submission of the vacation-holiday option proposals was publicized to employees almost at once, without waiting for negotiations [20] to resume. In some of its employee communications the Company stressed that the options were being offered as a direct consequence of employee reactions to its original offer. Thus the following appears from a script, in evidence, of a Schenectady GE television commercial on September 13:

[25] [Announcer]: Over the years, Schenectady General Electric has been trying to develop a relationship with its employees which simply stated means that the Company tries to be as responsive as it can to the real needs of its people. A good example took place a couple of weeks ago [30] when General Electric made a proposal to the unions with which it is trying to negotiate new contract settlements. The proposal was a good one. But, during the course of explaining it to the union employees at Schenectady General Electric, it became clear that many of these people would

rather see the proposal revised. As a result, the Company responded late last week with an alternate pro-

[54] The annual cost of the extra holiday was the equivalent of about a .4 percent wage increase. Approximately 10 percent of the employees had 25 years' service or more. The annual cost of the proposd [50] vacation improvment was thus the equivalent of a .2 percent increase under the national option. Under the local-by-local option it was expectably somewhat higher because of the element of adverse selection involved. In either case on a *3-year-basis*, the options offered were slightly more expensive to the Company than the 1 percent in wages [55] imposed as their price. This is so because the holiday and vacations would have gone into effect immediately whereas the compensating wage reduction would not have been applicable until the mid-point of the contract. However, on a long-term basis, assuming a carryover beyond the contract term, the options were worth less than the 1 percent in [60] wages required to be forfeited.

posal as the basis for a contract settlement. Let's discuss this proposal with Robert J. Buckley, manager of Union Relations [5] at General Electric . . . Bob, what was wrong with the initial proposal made by General Electric?

BUCKLEY: Bill, there's nothing "wrong" with the offer we made. It's just that many of our union employees told us they [10] would rather have some other things in the place of a wage increase.

M. *The Resolution at the IUE Convention for a September 25 Vote on the Recommendations of the Negotiating Committee*

[15] At the IUE convention held at Miami Beach between September 12 and 15, Carey and other speakers sharply attacked GE, and its asserted bargaining and other policies. The IUE-GE bargaining committee in a report [20] to the convention criticized the Company's proposal and charged the Company with pursuing a "take-it-or-leave-it" bargaining approach. The report in effect recommended rejection of the GE proposal in its then present form. The report further recommended that a Conference Board meeting be held in New York City on September 30, following further negotiations, to vote on [25] whether to accept an agreement or call a strike. The IUE negotiating committee adopted the following resolution, which was approved at a meeting of the GE delegates attending the IUE convention:

> All locals which have not yet voted
> must vote on the recommendations
> [30] of the Negotiating Committee
> on [Sunday] September 25.

Intermediate Report.

[35] N. *GE's Reaction to the Union's Call for a Vote*

1. Introduction

[40] The IUE constitution empowers its GE Conference Board alone to determine whether or not a strike should be called against the Company. Under the Union's official view, the local balloting was to be informative only, for the purpose of determining whether the employees favored acceptance or rejection of the Company's proposal. The Company, however, [45] chose to take a different view. In its Union Relations Bulletin[55] dated September 21, GE summed up its appraisal of the situation as of that time, as follows:

In Employees' Hands

[50] The question of whether there will be a strike is squarely in the hands of employees. Despite Carey's dark predictions in Miami last week that local votes are purely "informative" in nature, and that the "strike-no strike" decision will be made by the Conference Board, [55] we firmly believe that the Conference Board will not be so foolish as to call a strike in the event of a wide-spread "no strike" vote by the members back home.

And so the real scene of negotiations shifts from [60] *New York to all the IUE-represented plants. The eventual outcome will be decided there—quite properly —and quite soon.* (Emphasis supplied.)

[55] The Union Relations Bulletin was prepared under the supervision of Moore "for information of all [GE] management."

During the 2 weeks following the announcement of the local votes, the Company directed its energies in an all-out effort to assure that the "outcome" at the plant locations would be decided its way. Below is a general description of the various steps it took.

[5] 2. GE attempts to induce Local officials and employees to alter the time and place of voting and the question to be voted on

[10] Almost immediately after the Union announced that local votes would be taken, GE loosed an attack on the Union's election plans. In communications directed to employees and plant communities, GE characterized the local votes as simply a further step in Carey's plan to "steamroller" employees into a strike against GE in order to further his personal, [15] political ambitions. The communications charged that the local votes had been scheduled to be "held away from the plant and on a Sunday so that only local supporters will cast ballots," and that the ballots would be worded so that employees who did "make an extra effort to show up would not know what they were voting for."

[20] On or about September 15, the ERMs or other responsible plant officials at most of GE's locations, acting at the suggestion of New York headquarters, sent open letters to the top IUE local officials at their respective locations. It was stipulated that the content of all letters [25] were to the same general effect as in a sample letter in evidence. The letters stated that just as GE employees "have a right to strike if that is what they really believe is their only alternative," so, too, the Company has the

"right to take a strike." However—the letters went on—such a strike, should it occur, was likely to be a long one that would be "just [30] plain disastrous" for the employees as well as for the community, and one, therefore, that should not be resorted to unless "it unquestionably has the support of the vast majority of employees." Consequently, and "in order to encourage a maximum turnout for this important decision," GE was proposing to the Local officials: (a) that the strike vote announced for Sunday [35] September 25, be conducted instead on the preceding Friday or following Monday on company time and premises; (b) as an alternative, should the Local object to a vote on company premises, that the vote be held at a nearby outside site to be obtained by the Company, with the Company paying for all necessary transportation as well as for employee time lost in voting; [40] (c) that the vote be taken by secret ballot under the supervision of impartial outsiders and on the basis of eligibility lists prepared from current company records; and (d)—a point particularly stressed—that the ballot question be framed in clear-cut language so that employees would clearly understand that it was an actual strike vote and not something else, [45] as, for example, a vote "to support the Union and strike if necessary."

The Company did not prior to sending the aforesaid letters—nor thereafter—consult with or attempt to obtain the approval of the Conference Board's negotiating committee with respect to the proposals made.

[50] With possibly a few exceptions, the IUE locals declined to except the proposal made by the Company with regard to the local voting. Later that same week—as

appears from the same stipulation—the Company addressed letters directly to the IUE—represented employees informing them of the [55] proposal it had made to their local. The letters pointed out that the Local's "first reaction" was "not favorable" but that the Company still hoped that the Local "which should reflect the views of its members," would reconsider the matter if, as was suggested, the employees urged their local officers to do so. The letters stressed that it would be more [60] convenient for the employees to vote during regular working hours with no loss of pay, rather than on a Sunday, and also pointed out that one IUE local had already accepted the Company's proposal. In the same letters,

43

the Company suggested that the question of a strike had suddenly been "thrust upon" employees by the Union for reasons unrelated to the employees' interests. The letters stated (inaccurately) that the Company had offered three alternative proposals "in response to suggestions from [5] the negotiating committee," but that "just as it appeared that progress was being made," the Union's negotiating committee had departed for a full week's convention in Miami. There—the letters went on, again inaccurrately— "700 delegates . . . had directed that locals conduct a vote on Sunday, September 25," and "85% of [such] delegates . . . were from [10] companies . . . [which] are direct competitors of some General Electric component." The offer made by the Company, the letters emphasized, was "within the limitations imposed by the bitter competitive situation which the Company faces." The "major impact" of a strike, it pointed out, would "be on

individual employees and their families." The Company would suffer [15] too, "but lost customers can only mean lost jobs as well."

Through additional communications to employees, as well as through press releases and newspaper ads, the Company further sought to build up a ground swell of employee and community sentiment to force Local [20] acceptance of the Company's proposal as to the time, place, and conditions of the local votes.

On September 20, when formal negotiations resumed, the Union complained of the Company's "election interference" and announced, "The Union [25] rejects [The Company's proposals for local voting] naturally." The Company nevertheless thereafter continued its efforts along the lines aforementioned.

3. GE announces to employees that its offer is now final and reiterates its policy [30] not to make concessions because of a strike or threat of strike

As noted above, the Company had criticized the Union's negotiating committee for suspending negotiations for the IUE convention, implying to [35] employees that but for such suspension progress might have been made in the negotiations. However, following the announcement of the local votes, the Company, without waiting for negotiations to resume, took steps to impress upon employees that its full offer was now on the table and that the employees could expect to gain nothing more by reason of a strike or threat [40]of strike.

Thus in a teletype, dated September 16, 1960, GE headquarters suggested to EMRs that they construct their communications to employees around several "major points." Two of them were:

[45] The Company has offered *everything* that appears to be right in view of the facts revealed by our own independent studies, our negotiations with union representatives and today's highly competitive business situation. (Emphasis as in [50] text.)

The Company will not "up" the offer because of strike threats or strike action.

[55] Appended to the teletype was the text of a suggested letter to be "mailed to employees' homes this afternoon or this evening." The letters stated in part:

> The Company's proposal is on the table, and no one should be fooled into thinking that a strike threat, or a strike [60] itself will add *more* to the proposal. It never has in the past, and it won't now.[56]

44

On September 19, GE headquarters sent the ERMs a "Dear Employee" letter in Negotiation News format for release the following day when negotiations were to resume. The letter, subsequently used at plant locations, stated in part:

[5] At same locations it is reported that union officials are manufacturing a rumor that the Company can be persuaded to come up with some new proposal if employees will only show enough strike sentiment. It is

[56] This letter was mailed to employees' homes that day as suggested at least at some locations.

doubtful [10] that many employees will be misled into thinking that the Company would be indulging in last minute haggling. It is generally well understood by the union officials across the bargaining table that the Company is not holding anything back and that *the whole offer is now on* [15] *the table.* (Emphasis supplied.)

When negotiations resumed on September 20, the Company advised the Union that its full offer was now on the table, "Come October 2, Thanksgiving, Christmas, and Easter, it won't be any different," declared [20] Moore. At almost each negotiating meeting thereafter, the Company made statements of similar import. The finality of the position taken by the Company at the bargaining table was repeatedly reported to employees. One further example should suffice. The following is from a suggested employer letter in Negotiation News format, dated September 21, and thereafter [25] published at plant locations:

> We closed by saying again that everything that we are going to propose is on the bargaining table now, and there is simply nothing more to come . . . It has become apparent [30] that all the facts are in . . . and that we have gone as far as we can go without endangering the jobs of employees.

The repeated references to the finality of the offer, not only in written employee communications, but, as the record shows, also in oral [35] communications by supervisors, were coupled throughout the remaining period of negotiations with declarations pointing up the inevitable futility of a strike, regardless of its duration, in the light of the Company's policy not to give more simply to avert a

strike. Again one example should suffice. The general manager of the Bridgeport plant in a letter to employees [40] dated September 21, stated:

> Recently, a few questions have come to my attention as to why we modified our wage offer by offering an alternative extra holiday and fourth week of vacation. Actually, the [45] optional proposal simply represents a rearrangement of our original offer and not something that was added to the Company offer. I mention this so that there can be no misunderstanding as to whether a strike threat, or a strike itself, will add more to the Company proposal than is now [50] on the table. It never has in the past, and it won't now.

4. GE intensifies its attack upon the motives of IUE's leadership

[55] As earlier noted, the Company in its communications to employees had suggested right along, beginning even before the start of negotiations, that the IUE top leadership, particularly Carey, was determined to strike GE in 1960 for reasons unrelated to the interests of the employees and regardless of the fairness of the Company's proposal. The employee communica- [60] tions began to concentrate sharply on this theme about the time the negotiations recessed for the convention. While the convention was in progress, and even more so after the announcement of the local votes, the Company's attacks upon Carey mounted in volume and vigor.

45

The employees were told, *inter alia*, that Carey never had any intent of reaching a peaceful settlement with the

Company; that he was not sincerely concerned with the employees' interests but only with his personal and political ambition; that Carey, in furtherance of his ambition and in [5] reckless disregard of employee interests, was determined to obtain a strike come what may; that to assure a strike he had come up with a "set of demands so fantastic —that no company could possibly agree to them without driving itself out of business and employees out of jobs"; that toward that end he had stalled negotiations, had deliberately avoided reaching [10] an agreement and had finally broken off negotiations completely to "attend a union convention in a plush Miami hotel"; that he had set in motion a "strike steamroller" at the IUE convention with the aid and support of delegates representing employees of competing companies whose employees would profit at the expense of GE employees' job security should a strike [15] occur; now he was trying to "sneak" through by a Sunday vote a quick "no contract—no work" vote which could only lead to a 156 day Westinghouse-type of strike doomed for failure; that he was willfully misleading employees into a false assumption that the Company was holding something back that it might yield in a strike; that with Carey at the bargaining [20] table there was no hope for any real attempt to reach agreement by the Union; that there was no more the Company could do to prevent a strike; and that only the employees themselves could prevent a long Carey-dictated strike.

[25] 5. GE makes its offer effective for nonrepresented employees

Reference has earlier been made to the Company's practice under its uniformity policy of putting into effect for

nonrepresented employees [30] the wage and benefit improvements contained in its basic offer to unions. Prior to 1960, however, the Company had always withheld such action until either the effective date of its new agreement with the IUE or the terminal date of the old IUE contract, that is, the date that would correspond to October 2 in the instant case. In 1960, the Company at some of its [35] locations, while presenting to nonrepresented employees the details of its proposal to the unions, had advised them that the program would be put into effect for them on October 2, with, as was stated at one plant, any modification that "may arise after further study."

[40] Contrary to past practice, the Company in 1960 decided to accelerate the effective date for nonrepresented employees. The decision to do so was made after consultation with Moore about September 18 or 19. On September 20, GE headquarters by letter authorized operating managers to make effective for nonrepresented employees, as of September 12 if [45] they desired, the 3 percent first-phase wage increase as provided for in the Company's offer to unions, and, in addition, to announce the changes in employee benefit plans which were to be effective October 2, 1960, including the improvements in the insurance plan and the new income extension aid plan.[57] It was suggested, however, that changes in other [50] benefits such as pensions, vacations and holidays "be announced at a later date, when a clear picture emerges with respect to the application of the various options." Under the Company's proposal, the pension changes were not to be applicable until

[60] [57] The record shows that at substantially all GE locations the 3 percent increase was actually made effective for nonrepresented employees as of September 12.

January 1, 1961. Nevertheless, on either September 22 or 23—only 2 days or so after suggesting that such announcement [55] be withheld—the Company proceeded to announce that the pension changes were being put into effect for nonrepresented employees. Moore at the negotiating meeting of September 22 advised Carey of the Company's intention to make the announcement that day. The following colloquy then occurred:

46

Carey: Mr. Moore, don't you think that will inhibit you from making any modification to the arrangements that you proposed for us.

[5] Moore: It is a factor that we have to take into consideration.

It will be recalled that GE Vice President Day testified in substance that once GE has put into effect a pension plan for other bargaining units or for nonrepresented employees, the freedom of negotiators to [10] negotiate variances therein for other units is curbed.

Moore testified that his reasons for recommending that the wage and benefit improvements be put into effect at that time for nonrepresented employees were fourfold: (a) that the Company's offer to the unions had [15] been public knowledge for 3 weeks; (b) that it seemed evident at that time that an agreement with the IUE was not imminent;[58] (c) that the Company was getting "a considerable amount of pressure from [its] operating people as to when they could be in a position to tell the nonrepre-

[50] [58] But Moore could not recall this reason on cross examination.

sented employees what improvement in wages, benefits were in store for them and [20] when they would be effective''; and (d) that the Company had begun to receive acceptances of its proposal from other unions. (Actually, as the record shows, the Company up to then had received acceptances from only 9 local unions representing a total of 845 employees out of about 120,000 union-represented employees.)

[25] The reasons given by Moore are not persuasive. Those listed above as (a) and (b) are complete *non sequiturs* to the critical question of why the Company thought it desirable to depart from past practice to *accelerate* effectiveness for nonrepresented employees. The reason cited [30] as (c), I find wholly unconvincing. Not only was it not buttressed by detail, but no reason appears why ''pressure'' could not just as easily have been relieved by telling the operating managers that the effective date would be October 1, in accordance with past practice, as, indeed, the record shows some of the operating managers had already told nonrepresented [35] employees. It does not explain the need for acceleration.[59] As for reason (d), the connection between this and the decision to deviate from established custom is not apparent, and was not clarified by Moore while testifying. Even if it be assumed that the Company considered it unfair to deprive nonrepresented employees of wage increments already available [40] to

[59] When this was pointed out to Moore, on cross examination, Moore testified that the earlier representations to employees were not enough [55] to relieve the "pressure" because the employees had been told they would have the benefits of the proposal "plus whatever may further come out of negotiations" and therefore did not have "the details of what would be effective,", a matter on which "they retained a high degree of interest." But this answer, if taken at face value, simply confirms [60] the General Counsel's thesis that the acceleration was a "freezing" action, precluding bargaining flexibility thereafter.

even a handful of organized employees, this would not explain why the Company considered it necessary to accelerate announcement of other benefits which, as in the case of the insurance benefits and Income Extension Aid, was not to be operative in any event until October 2, or, as in the case of pension changes, would have to wait the turn of the year for their [45] effectiveness.

The General Counsel and the Union suggest that the Company's true motivation for accelerating the announcement was to influence union employees to press for union acceptance of the Company's offer, by proving to them

47

that the Company's position was already frozen, while at the same time demonstrating to them that the IUE's reluctance and failure to accept the company proposals was depriving them of immediate benefits. I am persuaded that the suggested inference is fairly warranted, taking into [5] account (a) the inadequacy of the Company's explanation; (b) the fact that the Company had just launched a vigorous campaign to get employee support in the upcoming votes on its offer; and (c) GE's representations as part of that campaign that the Company's full offer was on the table and that nothing could be gained by strike action. It is to be recalled, [10] moreover, that among the communication topics prepared by the Company months before for the 1960 negotiations was this: "Show how employees not represented by unions get their wages and benefits improvements without possible delay of waiting for union acceptance." This not only confirms the inference drawn above, but it shows that the acceleration action designed

[15] to influence directly employee attitudes was part of the Company's preconceived bargaining approach.

6. GE in its communications emphasizes danger to employee job security if its offer
[20] were enlarged or if a strike ensued

Note has already been made of the great mass of employee communications to which GE employees were subjected during the period following the IUE convention, as well as of the apparent purpose of the [25] communications to impair employee faith and confidence in the motives of the IUE top leadership, to induce a form of vote more to the Company's liking, and to impress upon employees the finality of the Company's position and the futility of strike action.

[30] During the same period, the Company in its communications continued to plug hard on the merits of the company offer. The communications did not always confine themselves to arguments that had been presented to the union negotiators. In some instances the Company elaborated its arguments far more fully to employees than it had at the bargaining table. [35] In some others, the Company presented arguments to employees that it had not presented at all to the union negotiators. The following situation at Lynn presents an extreme example. At Lynn, local management had sought to meet with representatives of the Local Union to discuss with them the local management's contemplated application at Lynn of the Company's proposed [40] retraining and reassignment program. The avowed object of the proposed meetings was to persuade the Local that the Company's proposed retraining program

as well as its employment security program, generally, offered particular advantages to Lynn employees and should be accepted. The Local, however, refused to meet separately with the Company for that purpose, taking [45] the position that local discussions at that time on retraining and employment security were improper and premature since the subjects were then under negotiation at the national level. Any proposals Lynn management cared to offer on those subjects, the Local stated, should be submitted to the national negotiators. The Local adhered to that position notwithstanding several [50] attempts by local management to obtain a meeting. Unsuccessful in its efforts to meet with Local officials, Lynn management proceeded to go directly to the employees. On September 19, the GE News at Lynn devoted three of its four pages to a detailed discussion of its local plans for retraining and makeup that it had wanted to discuss with the Local Union. [55] The discussion pointed up the advantages to employees of the Company's proposed program. The last page of the GE News contained an editorial, charging that "Top IUE officials, aided by a few local union officers" were "trying to railroad Lynn employees into participating in a strike." The editorial also sharply criticized the Local officers for "trying to shut [60] out the membership from learning how the retraining and makeup proposal could be worked out locally."

48

The Company's employee communications during this period emphasized particularly that GE has gone as far as it could without endangering its own competitive position, and the security of employee jobs. For example, in

Schenectady, on September 20, GE Vice President Ginn [5] in a television address, printed the next day in the GE News, declared:

> Even without the threat of a strike, Schenectady departments are in a competitive fight for their lives. The way you vote . . . could go a long way toward [10] deciding whether your department has an even chance in this fight . . .

In Philadelphia, the Company on September 20 wrote each "Dear Fellow Employee" that any improvement in the Company's offer involving any additional cost [15] would "result in fewer jobs here." And in the same plant, on September 23, the general manager of the switchgear division stated in a message to employees that in view of increasing competition the decision the IUE members made "may well determine the future of our switchgear business."

[20] In discussing bargaining issues with employees, the Company did not always adhere to the positions expressed by its negotiators at the bargaining table. Thus, it will be recalled that when the IUE negotiators at the negotiation meetings sought to ascertain the cost of a fourth week of vacation for 20-year service people, the Company took the position that [25] costs were irrelevant, declaring that it negotiated solely on the basis of "level of benefits" and what was the appropriate thing to do. However, A. C. Stevens, Schenectady's ERM, in a talk to employees on September 21, stated in part:

[30] I know there's lot of talk going around the shop that the whole proposition looks pretty good and would be ok if the Company would just make the 4 weeks vaca-

tion available to people after 20 years service. But the difference represents a very sizeable increase in [35] cost . . . and we just don't dare incur the extra cost with the uncertain future that faces us at this time . . . there's a limit beyond which we don't dare go at this time without jeopardizing the future of our business and the very jobs we're trying to make more secure.

[40] In addition, the Company in its communications and local advertisements repeatedly warned the employees and the communities that a vote against the company offer—which it always referred to as a vote to strike—would jeopardize employee jobs and inflict serious harm upon the [45] communities. The warnings, with few exceptions, were couched in the language of general predictions as to asserted permanent losses of business that would flow from a strike. But the constant repetition of this theme and the manner of its presentation quite clearly reflect a purposeful design to play on employee fears and insecurities. Pittsfield serves as an [50] example. At that location, a GE advertisement in the Pittsfield *Berkshire Eagle* for September 21 included the following statement:

> If our employees vote to strike next week they could seriously jeopardize their job security—and jobs—for [55] months and or even years to come.

Another full-page advertisement in the same newspaper the following day stated that:

[60] If members of IUE vote Sunday to strike General Electric they will most certainly jeopardize the welfare of their families and their communities for years to come. A vote to strike would also jeopardize General Electric's jobs in Pittsfield in the future.

The next day a full-page display in the Pittsfield *GE News* stated:

> Make your vote count Sunday! If you vote *for* a strike . . . you will jeopardize your pay, your families' welfare and [5] your job.

In a press-radio release 1 day later, Pittsfield management stated:

> General Electric's Power Transformer Department will [10] *automatically be excluded* from bidding on 30 to 45 transformer transactions each month if a strike occurs at the local plant.

No reason was stated for the alleged automatic exclusion.[60]

[15] At some plants, the Company's warnings were more specific. Thus, at Waterford the manufacturing manager in a letter to employees, dated September 16, stated that the "strike" vote

[20] represents a fork in the road in determining our plant's future. It may well determine whether it will keep on growing . . . a strike would wipe out *indefinitely* all of the 75 new jobs created . . . since . . . 1958. *It would also bring about a direct reversal of promotions, and* [25] *result in a great many downgradings in reassignment.* (Emphasis added.)

On September 22—after the Waterford employees had voted to reject the offer—the Waterford general manager in a letter to employees termed those [30] who voted for a strike as voting to destroy the business, also repeating in that letter that "the offer will not be changed by a strike threat." At Waterford, also, the Company sought to bring

---

[60] [60] Moreover, the Manager of Union Relations at Pittsfield admitted while testifying that during this period he engaged plant employees in conversations in which he told them that a strike could result in loss of Government contracts and consequent loss of employee jobs.

secondary pressures to bear on employees. On September 26, the local management sent a letter to "community neighbors." The letter enclosed a list of GE employees residing [35] in the "neighbor's" community. It suggested that the neighbor "contact personally any of our employees whom you know and have them impress the seriousness of the situation on their union leaders." The letter emphasized that "many hundreds of local jobs [are] at stake" with a potentially harmful effect on community business.

[40] At one of the Company's largest and oldest plants —Lynn—foremen warned employees that there was a serious possibility that a strike might cause GE top management to close down the Lynn plant entirely. In a Management News letter, dated September 22, the supervisors were given a [45] "message" headed "Lynn Hangs in the Balance," which they were told "you should get across to IUE members to-day." The message stated in part:

> But there is more at stake than just a long strike . . . As you know the Company has more and more in recent years [50] looked to the south and the west for its growth and expansion . . . General Electric has not forsaken its old-line plants . . . Despite the greater costs, it has maintained respectable employment levels and has continued to invest money in them.
>
> [55] But it just does not make sense to continue to invest money in the older plants when they may, upon the whims of union officials, be shut down at any moment . . . There is no

> reason why the Company should continue to keep all its eggs in several large baskets—unless employees and

management can demonstrate that they are willing to compete with newer locations . . . But we can very frankly [5] see all our efforts going down the drain if we are struck by the very employees toward whom the 1960 contract is specifically aimed.

So, as Lynn IUE members come up to the day of decision [10] on their strike vote, they are, in a very real sense, voting upon their futures . . . a pro strike vote . . . will have disastrous consequences that reach far beyond a strike itself.

Credited testimony in the record reflects that about this time foremen at [15] Lynn were speaking to employees and telling them that the Company's offer was a good one that should be accepted; that it would be "crazy" for employees to strike; that a strike would cause the Company to move out of Lynn.[61]

[20] Also at Lynn on September 22, the Company in a plant newspaper told employees in its Aircraft Accessory Turbine Department that before making up their minds on the company offer and the union strike vote, employees should consider, *inter alia*, that

[25] Right now these old line plants are under a severe competitive handicap. In fact, the most severe handicap possible. We find it hard to compete with newer plants in our own company. We find it harder to compete with newer plants of our competitors. And we find its hardest [30] to compete with foreign companies.

---

[61] The General Counsel's witnesses giving such testimony referred to two [55] foremen specifically. One of them was no longer in the Respondent's employ at the time of the hearing. The other, who appeared as a witness, testified at first that he could not "recall" making the statements, but later conceded that he might have told the employees it would be "crazy" for them to strike. Although he did not concede [60] saying anything about plant removal, I think it entirely plausible that he did make such statements, as the General Counsel's witnesses testified, in view of the newsletter referred to above. I find accordingly.

> All of us can look around and see that much heavy industry is disappearing from New England . . . A strike may not put the old plants out of business—but is sure will make [35] the job of keeping them competitive a lot more difficult.

O. *Negotiating meetings between September 20 and October 1*

[40] Negotiating meetings resumed on September 20, following the recess for the IUE convention. Under the schedule as originally agreed upon, negotiations were to continue through September unless an agreement was earlier reached. Then formal negotiating meetings were held between September 20 and October 1, before the strike began. During that period, [45] there were also three so-called "sidebar" (informal) meetings, to which more specific reference will be made below. Beginning on September 21, Federal mediators, who were called in at the request of the Union, attended the formal meetings.

[50] As earlier noted, GE advised the Union on September 20 that its full offer was now on the table and would remain unchanged regardless of

how long negotiations continued. Throughout the period now under consideration, the Company constantly reiterated that position.[62]

---

[45] [62] For example, at the September 21 meeting, Moore, reading from a prepared statement, declared, "Everything we are going to propose is before you now. There is simply nothing more to come." On September 22, when Carey asked whether there was any item in the Company's proposal that [50] Moore could change, Moore replied, "Mr. Carey, I don't know who you are used to dealing with, but you should know by now that the GE proposal is on the table. It is here, Mr. Carey. That is all there is." Statements by Moore to like effect are to be found interspersed throughout the negotiating minutes during this period.

The Company asserts that it nevertheless did in fact negotiate [5] "changes in or additions to" its original offer during the period under consideration, and cites four in its brief. Two, however, did no more than provide for the furnishing of certain information relating to the operations of the GE pension and insurance plans. The information was of a kind that GE in the past had voluntarily furnished the Union and [10] would have been legally required to furnish on request even in the absence of contractual covenant. The inclusion of the contractual requirement reflected simply an affirmation of an existing practice rather than a "change" through negotiation.

[15] The third asserted change involved a reduction in the amount which GE employees on leave as union representatives had to pay to maintain their interest in the GE pension plan. Under the IUE-GE Union Representatives Pension Agreement, a collateral agreement, GE's entire cost of maintaining the union representatives Pension Plan interests was billed to the Union. [20] The Union in its detailed pension proposals submitted on August 18, had requested, *inter alia,* that GE modify the agreement so as to compute the cost to the Union on the basis of the current actuarial assumptions rather than on the basis of the higher 1955 assumptions. The Company's offer had made no reference to the Union Representatives Pension Agreement. [25] Nor, so far as appears, was this matter considered in negotiations at any time prior to September 21, when it was collaterally raised during a discussion of another pension issue. At that time, Moore simply stated, "We reduced this [the cost of maintaining the union representatives interest] by one-third, you know." Later, Willis, the Company's benefits [30] expert, made clear that the

reduced amount was in line with the Company's "estimate" in rounded figures of what the *actual* cost would be during the new contract term. It would appear from all the evidence that this item did not involve a negotiated "change" or concession but simply an original declaration by the Company of its position.

[35] The fourth asserted change relates to a provision in the Insurance Plan known as Exclusion K, also sometimes referred to as the "spouse" provision. That provision barred recovery by employees of medical expenses incurred by dependents, or even themselves, where coverage for [40] such expenses was also provided for under another group program.[63] The Union in its original demands had requested the total elimination of Exclusion K. The "spouse" provision was discussed at the meetings of August 30 and September 1. The Union pointed out that under the

GE Insurance Plan an employee desiring to participate in any part of the insurance program—which provided for a number of other coverages besides medical care—had to participate in the entire program. The Union complained that it was unfair to require an employee to pay premiums for health [5] insurance where benefits thereunder were precluded by Exclusion K. Subsequently the Union modified its demand on "spouse coverage" to state specifically:

[55] [63] For example, if a GE female employee's husband working for another company was a participant at the other company in a group plan providing medical coverage for himself and his spouse, the GE employee would not claim benefits for medical expenses incurred either by her spouse or herself even though she paid for the GE insurance. However, if the [60] husband had an *individual* policy which provided coverage for his wife, the GE employee could recover for such medical expenses even though the husband also separately recovered under his own policy.

"Provisions should be made whereby employees have the option of purchasing the entire insurance and health program or the insurance program alone." The negotiating minutes in evidence show no further [10] mention of the "spouse" issue at any time between September 1 and September 26. It came up on September 26 in the following way: The Union that day had submitted for the consideration of the mediators a summary of the status of negotiations, listing, *inter alia,* the Union's revised "spouse" demand as an outstanding issue. While reviewing the [15] Union's summary, Willis for the Company stated that the inclusion of the "spouse" demand as an outstanding issue was in error. The Company, he explained, had earlier agreed to revise Exclusion K so as to make it inapplicable to situations where those insured under the *other* group plan paid the *entire* premium cost without any employer contribution. The [20] Company's revision of Exclusion K was of limited application and of negligible cost to the Company on a per employee basis. Though the revision did not meet its basic objection, the Union considered it a good improvement over the former Exclusion K and did not press its position on the "spouse issue" further. The respondent states in its brief that the [25] Exclusion K modification was effected on September 26. It is evident from what has been said above, however, that the Company must have changed its offer in that respect sometime earlier, but just when—whether before or after September 20—the record does not show.[64]

[45] [64] This view is confirmed by other evidence. In the Company's teletype report of the day's negotiations, the Company characterized the day's session as "fruitless," making no mention of the revision. Moreover, [50] at the meeting of September 29, Swire, who had not been present on the 26th, expressed sur-

(Footnote continued on following page)

[30] In any case, it is clear that the Company did not regard any of the aforesaid changes, when made, as a matter of any significance. They were never so much as mentioned in employee communications or in outside releases during the entire period of negotiations. In a teletype issued on October 2, GE, answering a *New York Times* article which had characterized [35] its attitude as being "take-it-or-leave-it," referred to the various changes which, so it stated, had been "made in direct response to declarations of the union bargaining committee." The only ones listed were (1) the wage reopener, (2) the holiday-vacation option on a national basis, and (3) the holiday-vacation option on a local-by-local basis.[65]

[40] During the period in question, the Union indicated its willingness further to reduce or modify some of its proposals and suggested compromise solutions as to others. Except for the two information "changes" noted above, all union-suggested revisions were summarily rejected.

53

The Company's attitude at this stage of the negotiations is pointed up by its position on retraining and reassignment. Prior to the IUE convention, the Company

(Footnote continued from preceding page)
prise over the Exclusion K change, explaining that "the [Union] committee said we did not hear it across the table." Moore replied, "I thought this was covered across the table very thoroughly, in fact I went to the trouble of making it very clear to [55] Mr. Lawalin." If so, this must have been before the 26th, because Lawalin, a union committeeman, was not present on the 26th. Bearing in mind that Moore had announced on September 20 that there would be no further changes in the offer and that the Union had not pressed its "spouse" demand in the interim, there is reason to infer that the [60] Exclusion K revision occurred prior to September 20. Further support for such an inference is found in a statement by Moore at a subsequent meeting that GE's position "hasn't changed and will not change under threat of a strike."

[65] Actually, as has been seen, none of these were *requested* by the Union's bargaining committee.

had implied a willingness to drop the R & R provision from the national agreement if that were the Union's wish. The [5] Union had then stated that it did not want the provision dropped altogether, but wanted it "fixed" to meet its specific objections. This the Respondent had not done to the Union's satisfaction. After the resumption of negotiations, the Union several times requested that the R & R be kept out of the national agreement and be left entirely for local negotiations.[66] [10] But the Company now refused. It continued thereafter to maintain that position until the Union's strike capitulation. Then, when it could no longer be said that the Company had been forced to yield by reason of a strike or threat of strike, the Company acceded to the Union's request.

[15] The Company also declined as it had done before to provide the Union with cost or other information relevant to bargaining issues. On September 21, the Company rejected a union request for a pension plan modification because of the cost involved. But on the following day, when the Union requested the Company to specify the difference in cost, the [20] Company fell back on its familiar refrain, "We talk level of benefits, not costs." On September 27, when the Union asked the Company for the cost to it of the vacation-holiday option which the Company had offered at the price of a 1 percent wage reduction, the Company declined the information, stating that it did not make its offer on the basis of costs but on the [25] basis of reasonableness. The Company for the same reason declined to supply information as to the cost to it of a fourth week of

[60] [66] The Company had stated from the beginning that the R & R plan would not be utilized at any location unless a separate agreement with respect to its operations was worked out between the local management and the local union.

vacation extended to employees with 20 or more years' service. But only a few days before the ERM at Schenectady had told employees that the difference between a fourth week of vacation for employees with 25 years' service and one for employees [30] with 20 years' service was a "sizeable" one that the Company did not dare incur without jeopardizing its business and the security of employee jobs. On September 22, the Union by letter made a detailed written request for information relating to various matters involved in the negotiations, including some of the information that had previously been requested orally. [35] The request was not complied with until after the strike when the information was no longer of any value for negotiations, and even then only in part. This particular aspect of the case, including the Company's specific defenses, will be considered in greater detail in a separate section of this report, below.

[40] The Company's avoidance of justifications for positions taken was also reflected in other ways. Its stand on pensions provides a good illustration. The Company's pension proposals provided, *inter alia*, that the guaranteed minimum monthly pensions for each year of service were to be [45] increased to $2.40 (from $2.25), with a second stage increase to $2.50 on April 2, 1962, the midpoint of the proposed contract. The raise from $2.25 to $2.40, however, was not to become effective until January 1, 1961. The Union took the position from the outset that the effective dates of the new contract and of the initial increment should coincide so as not to [50] prejudice employees retiring between the contract date and January 1, 1961. And in the course of time that issue became the only obstacle to com-

plete agreement on the pension aspect of the contract. When the question first arose on September 1, the Company justified the January 1 date on the asserted ground that it had always been its practice to effect pension [55] changes on the first of the year. That justification was dropped, however, after the Union pointed out that in 1955 the effective date of the pension changes had coincided with the new contract date. When the subject came up

54

again on September 21, the Company indicated that its justification was related to costs. But on the following day when the Union asked for the difference in costs between its proposed effective date and the one proposed by the Company, Moore refused to provide the information, [5] declaring, "We don't talk costs. We talk level of benefits." The Company declined to give any reason for fixing January 1 as the effective date, except to say it considered that the "appropriate date" and the burden was on the Union to convince the Company differently. When the Union asked why April 2, 1962, had been set as the effective date for the second phase, [10] Hilbert explained that it was the midpoint of the contract when the wage structure was to be changed. The Union then argued that by the same reasoning the initial increment should also coincide with the first phase wage increase. At that point Hilbert declared that the Company would "consider" doing so. During the afternoon session that same day, Carey [15] referred to Hilbert's earlier declaration and stated that with that issue out of the way the Union now believed it had reached full agreement with the Company on pensions. Moore, however, promptly repudiated Hilbert's expressed

willingness to "consider" a change in the effective date. The Company, he said, was not "taking anything under advisement for later [20] consideration," even on a tentative basis. "We have everything there is on the table," Moore added. The Company never did attempt to meet the Union's argument on that issue. At the September 27 meeting, when the Union again asked why the January 1 date was chosen, Hilbert stated, "You know it's the beginning of the year and it's the time that you make all the [25] resolutions for the New Year's and all that." Willis' accompanying response was scarcely more illuminating. "We think it is the appropriate date," was all he would say. Willis' laconic response was typical of many others the Company made in response to union arguments during this period.

[30] Perhaps the clearest revelation of the Company's bargaining frame of mind came at the meeting on September 28. At the time there were still three scheduled negotiating meetings left before the contract was to expire. The Union had theretofore several times reduced its demand for SUB in an effort to meet company objections. Its last previous proposal had been [35] rejected on the ground of costs. On September 28, Jandreau, the Schenectady delegate on the IUE negotiating committee, suggested as a possible solution "within the framework of the [Company's] costs" that the Company provide an additional option (presumably on a local-by-local basis). Under it 1 percent of the Company's proposed wage increase along with money available [40] under Income Extension Aid would be used to set up a fund upon which employees might draw to bring their unemployment compensation up to 50 percent of earnings. Jandreau made it clear that the

plan he proposed working out along those lines was not to add to the costs of the Company's proposals. Jandreau's suggestion was rejected by the Company. Later at [45] the meeting the following colloquy occurred:

> Jandreau: Mr. Moore, can I ask a question? Is it possible to change the company proposal one way or another? I ask this because you said to me and McManus [50] that this is it. It is all on the table. Is there any chance of changing your position one iota.
>
> Moore: There are two things, Mr. Jandreau. After all our month of bargaining *and after telling the employees* [55] *before they went to vote that this is it, we would look ridiculous to change it at this late date;* and secondly the answer is no. We aren't changing anything come a strike or high water. (Emphasis supplied.)

[60] Jandreaus: There is no sense in being here.

> Moore: Unless there is anything you want us to hear. If you have something now or persuasive, persuade us.

55

> Callahan: You said you wouldn't change the proposal before, because of the employees.
>
> Moore: I said two things—one, that everything we [5] think we should do is in the proposal and we told the employees that, and we would look ridiculous if we changed it.

Later, Hilbert adverted specifically to Jandreau's aforementioned suggestion [10] for an additional option within the framework of the Company's costs, and declared:

I think we are in the final stage of negotiations, and I think it is frivolous for the union to make [15] proposals for changes at this time in the nature of Mr. Jandreau's. There would be three possible reasons why we would make a change at this time. First, if we had intentionally held something back and if we had done that and we revealed it now [20] *we would look foolish in the eyes of employees and others* . . . Secondly, if we made a serious error, an inadvertent error in the offer, and we have no such evidence of that, to warrant a change. Third, if we were so frightened of a strike that we would [25] change the offer just to avoid it and *then we would look even more foolish in the eyes of our people and of the country.* We don't think any of the three apply to this case. (Emphasis added.)

[30] Later:

Jandreau: . . . I am not trying to build up a ratchet situation. I am trying to work within the proposal.

[35] Hilbert: I am not sure you are saying that seriously, Leo.

Jandreau: I am speaking seriously and I am seeing whether you are following Boulwareism or not.

[40] Hilbert: What do you mean, Boulwareism?

Jandreau: Your take it or leave it. Moore said that that is all and there isn't any more, and you have just backed him up with your three types of reasons.

[45] Hilbert: What other reasons could there be?

Jandreau: Option 4 we put forth.

[50] Hilbert: That falls into reason 3.

The negotiating minutes and other evidence relating to this period do not bear out GE's representations to em-

ployees that Carey was determined to force a strike on GE, come what may. On the contrary, the record [55] reflects that Carey, while unwilling to capitulate to the Company's position, was anxious to open up some other avenue that might possibly lead to a peaceful solution on terms more to his liking. The Company showed little inclination to aid him.

[60] Carey had long complained—whether correctly or not is not in issue—that the Company's principal negotiator, Moore, lacked the requisite authority to deviate in any significant way from GE's offer. On a number of occasions, Carey unsuccessfully sought an opportunity to meet and confer

56

with Vice President Parker, the GE officer having primary responsibility in the area of labor relations. On September 26, the mediators requested that such a meeting be arranged. In response, Moore stated that Parker would meet with Carey that evening "if Carey wanted to hear from Mr. Parker [5] that that's all there was and that it [the full offer] was on the table." At the sidebar meeting that evening—attended by Carey, Callahan and Fitzmaurice for the Union and by Parker, Ritter and Moore for the Company—Parker declined to do any more than state what Moore had said he would state. When Carey sought to discuss with him some of the issues in [10] dispute, Parker refused to be drawn into any such discussion, declaring that that was not a negotiating session. He told Carey that "as far as the Company is concerned, we have no more to offer, but if you want to talk about it at the bargaining table you go ahead and do it." Parker's assertion that the Com-

pany's offer would not be changed was thereafter [15] broadly publicized by the Company to its employees as positive confirmation of the Company's earlier declarations that employees could hope to gain nothing further through strike action.

Also at the sidebar meeting on September 26, Carey specifically [20] proposed that the six people then meeting should spend some time in an effort to hammer out some agreement in principle. Carey explained that it was his experience that a meeting of that nature was more conducive to the settlement of issues than larger meetings of the kind engaged in at formal negotiating meetings. The Company rejected Carey's request. Moore [25] at the hearing testified that his stated and actual objection to Carey's proposal for a reduced bargaining committee was his "sincere belief" that

> collective bargaining takes place across the bargaining table with the full committee and is not to take place [30] at any sidebar meetings or with any side deals not *in full view of the public* and the negotiating committee on the union side. (Emphasis added.)

On September 26, Carey in a letter to Ralph J. Cordiner, chairman [35] of the GE Board, proposed that the issues between the parties be submitted to either (1) a fact-finding board without authority to make binding recommendations or (2) an arbitration board with power to make a binding award, the choice to be left to the Company. The matter was referred to Moore who rejected the request, stating numerous reasons. The reasons are [40] not detailed here, because, contrary to the Union's contention, I do not consider the Company's rejection of third party interven-

tion as having evidentiary value on the issue of whether the Company bargained in good faith. The Union's request for such intervention is cited here only because of its bearing on GE's representations to employees concerning [45] Carey's strike motives.

Cordiner in his direct reply to Carey's letter of September 20, while reasserting that Moore had "full authority and responsibility" to represent the Company in its negotiations with the Union, told Carey that [50] Parker "as the senior officer in this important area of responsibility" would continue to be "available for meetings outside the negotiations." On the strength of that statement Carey arranged further sidebar meetings with Parker—also attended by others on each side—on September 29 and October 1. These meetings took substantially the same course as the [55] sidebar meeting of September 26.

During the last days of September, as the contract's expiration date neared, the Union sought an extension of the contract so that efforts to reach agreement might continue without a strike. Prior to September 29, [60] all of the Union's extension proposals were tied to other requests, either that the Company arrange to have an officer participate in negotiations or that the Company consent to fact finding or arbitration. The Union's extension proposals were "categorically" repected by the Company, primarily

on the ground that it was the Union and not the Company that had elected to terminate the contract on its expiration date. The Company made it quite clear that it was op-

posed, even in the absence of conditions, to any contract extension, or, for that matter, to any "delay in settling [5] the strike question—one way or another."

At the September 29 formal negotiating meeting, the mediators proposed that the parties continue to bargain without interruption of production and preserve the "*status quo*" (which they explained contemplated [10] the extension of the contract) until a new agreement was reached. In a private session with the mediators the previous day, Carey had indicated his willingness to agree to an unconditional contract extension. Both he and the mediators believed, however, that the chances of a cordial reception by GE would be greater if the proposal came from the mediators [15] rather than from the Union, and if the Union were to withhold formal acceptance until the Company replied. It had been arranged to proceed accordingly. When the mediators on September 29 made the proposal, Carey immediately responded that the union committee would withhold its reply until after it received the Company's answer and had reported to the [20] Conference Board. The Company, however, after ascertaining that the proposal contemplated an extension of the contract, promptly declared that its answer had already been given. The Company's reference was to its "categorical" refusal at the bargaining session the day before to agree to any extension beyond the contract's expiration date. Though not so [25] told at the meeting, it appears that the Company was aware that the mediators' proposal had the prior blessing of the Union.[67]

[55] [67] This is apparent from a company teletype, dated October 1, wherein it was stated that "he [Carey] got the mediators to make a proposal for him to extend the contract."

Later in the session the Company formally declared its position as follows:

[30] . . . we must point out that on October 1 the IUE agreement will terminate as a result of notice given by the IUE to us several weeks ago. There will be no extension of the contract beyond that termination date . . . for 15 days, 10 days, for [35] five days or even one day. *With that termination, the cost of living excalator arrangement will terminate. In addition such matters as union dues checkoff, pay to union officials for grievance time and superseniority for union officials and related matters will have to be considered and reconsidered by* [40] *us as they will no longer be binding* . . . The current pay, seniority, pension and insurance and other benefits will be continued in effect for all employees who report for work . . . (Emphasis added.)

[45] At the opening of the September 30 session, Carey announced that the IUE-GE Conference Board had adopted the recommendations of its negotiating committee to reject GE's offer and to shut down GE plants on October 2 because of GE's refusal to continue the contract.

[50] On October 2, the strike began as scheduled, with only the Schenectady local remaining at work.[68]

[68] Schenectady, however, joined the strike on October 6.

P. *Alleged local bargaining; other events during the strike*

1. Offer at Schenectady and Pittsfield of more favorable truce terms than those theretofore offered the Union

[5] In rejecting the truce proposal made on September 29, the Company stated it would commit itself only to maintain in effect the then current [10] pay and fringe benefits for employees reporting to work after October 1. The Company made clear that after October 1, it would regard its *contractual obligations* as having come to an end. Among those which it specified it would thereafter regard as no longer binding were "such matters as union dues checkoff, pay for union officials for grievance time and superseniority [15] for union officials." As to such union-related terms and conditions, the Company stated that it would have to "consider" later whether or not and under what circumstances the Company might retain them in effect.

The Company did not thereafter in the national negotiations [20] say anything further about what it proposed to do with regard to the union-related conditions until October 7 at the earliest, although there were several negotiating meetings in the interim.

In the meantime, on September 29—the very day the Company in [25] national negotiations expressed uncertainty on this point—a company consultant, acting pursuant to a policy decision arrived at by Moore and his staff in New York, authorized Employee Relations Manager Stevens of Schenectady to maintain in effect at that location, provided that the employees there did not strike,

all preexisting terms and conditions of the [30] expiring contract (except for the cost-of-living escalator) including the union-related and grievance-related conditions. On September 30, the Company announced to its Schenectady employees that the plant would be open on Monday, that all preexisting practices, policies, pay rates and benefits would continue in effect, and that the Company would "continue to recognize [35] all present local union relationships, including superseniority for shop stewards, the grievance procedure, etc." The Schenectady IUE local had theretofore voted not to strike. No similar announcement was made at that time at any other IUE-represented plant, except at Knolls Atomic Power Laboratory, a satellite of the Schenectady plant, also under the jurisdiction [40] of ERM Stevens.[69]

On October 3, Business Agent Leo Jandreau of the Schenectady local stated in a message to the Local membership that because of the Company's refusal to continue the contract beyond October 1, 1960, "the contract [45] provisions for grievance machinery, protection covering working conditions, seniority, prices, wages and many other conditions [including recognition of elected union representatives] can no longer be enforced." Jandreau recommended a "no contract—no work" course.

[50] In evident response to Jandreau's message, ERM Stevens issued a statement to members of the Schenectady local that same day, in which he declared the Company's intent to "commit" itself to retain in effect all "protections of the contract" so long as the local was not on strike. Stevens that same day also made a similar commitment to

[69] The KAPL employees, who are organized into a separate IUE local, had [60] theretofore voted to reject the Company's offer.

Jandreau—confirmed [55] in a letter, dated October 4, reading as follows:

59

Dear Mr. Jandreau:

This is in response to your suggestion that I put on paper our agreement to continue protections of the Company- [5] Union contract which was terminated by the International as of October 1, 1960. I am pleased to do so herewith:

We agree to extend to you protection of the recent contract, including grievance machinery, [10] protection covering working conditions, seniority, prices, wage rates, and any other condition of employment recited in the contract. Current cost-of-living adders will remain in effect. We will continue union representation [15] recognition as presently constituted and all the above will remain in effect so long as we are not on strike.

Very truly yours,

[20] A. C. Stevens

In publicity to employees at Schenectady, the Company declared that "the same offer had been made by General Electric negotiators in New York to [25] IUE President James B. Carey before Carey called a strike against the Company [and that] Carey refused the offer." That was not true.

The same truce terms were also offered on October 4 to the IUE Pittsfield local. That local had also theretofore voted to accept the [30] company offer, but, unlike Schenectady, had joined the strike at its inception. On October

4, ERM Arthur Mellikan of Pittsfield offered the local union at that plant the same truce conditions that were given Jandreau in Schenectady.[70] Mellikan's offer was broadly publicized to employees at Pittsfield, through press releases, plant communications, and individual [35] letters to employees.

2. Direct dealings with other IUE locals regarding truce terms

[40] On October 4, the Union filed an unfair labor practice charge against the Company based in part on the offer to Local 301 at Schenectady for a separate truce agreement. Some time after the charge was filed, the Company informed the IUE national negotiators that the conditions offered the Schenectady Local were generally available to all IUE locals not on [45] strike. There is a dispute as to the date this was done. The Company claims such a proposal was orally made on October 7 by Counsel Hilbert for the Company to Counsel Sigal for the Union. The Union, on the other hand, claims that the proposal was not made until October 10, when it was made in writing. Because it is undisputed in any event that the proposal was [50] made on October 10 and nothing of consequence to the issues herein occurred in the interim, I find it unnecessary to resolve the sharp conflict on that point.

---

[55] [70] The Company's assertion in its brief that the offer at Pittsfield was solicited by the Local is not supported by probative evidence and is found to be contrary to fact. Moore testified that before the offer was made he had been informed that an unidentified Local official had inquired of Mellikan whether the Local there could have the Schenectady [60] terms if it returned to work. Moore's testimony, however, was based on hearsay twice removed, and is in conflict with the direct testimony of Arthur LaBlue, the Pittsfield Local's business agent to whom Mellikan made the offer. Mellikan did not testify. LaBlue is credited.

The Company's written proposal on October 10 was "to reestablish in any IUE unit which is not on strike" all terms and conditions of the expired contract (except the escalator clause) including such matters as checkoff, grievance procedures, and privileges of union officials. Elsewhere [5] the Company made clear that the union-related conditions would be reestablished only in units where local officials publicly announced a return to work and employees returned accordingly.

The Company's October 10 truce proposal was not accepted by the [10] IUE national negotiators. Notwithstanding its rejection at the national level, the Company sought at some plants to obtain its acceptance at local levels through direct contacts with local officials as well as by appeals to employees.

[15] Thus, at Lynn, ERM Burns wrote Local Business Agent McManus on October 10, requesting a meeting to discuss, among other things, a strike truce. He specifically proposed working out a separate memorandum of intent applicable at Lynn for an interim agreement reestablishing all former contract provisions (except the escalator clause) and for the return of [20] Lynn's employees to work while national negotiations continued. The refusal of the Lynn Local officials to discuss a separate truce proposal was thereafter criticized in communications to employees. The employees were urged to let their union officials know how they felt about a "truce" proposal. The Company's communications to employees emphasized that a [25] continuation of the strike would cause loss of jobs through loss of contracts, diversion of work to other GE plants, and the like.

At *Waterford,* the Company wrote the president of the IUE Local, informing him of the proposal made at the national level and inviting [30] separate acceptance by the IUE Local. At about the same time, the company foremen telephoned the Waterford strikers individually to advise them of the proposal given their Local president and to urge its acceptance at a membership meeting, which they stated ought to be called for that purpose. At a meeting with the Local officials on October 14, called by the Company, [35] the Company stressed that a substantial number of Waterford jobs would be permanently lost if the Waterford plant did not soon return to production, and again urged Local acceptance of the truce proposal. The meeting was followed by further telephone calls made by foremen to the employees summarizing the information given Local officials as to the number of jobs [40] being endangered by the continuation of the strike. The employees were again urged to convince their Local officers to abandon the strike "under the protection of the Company's truce offer."

At *Louisville* and at *Bridgeville,* the Company in letters to the [45] IUE Local presidents, dated respectively October 14 and October 20, similarly invited separate Local acceptance of the truce proposal made in national negotiations and there rejected.

At *Syracuse,* on October 17, 1960, Loren Vinal, president of the [50] Syracuse Local, telephoned James Delmonico, the Union Relations Manager of the GE Syracuse plant, regarding the vacation pay of a striking employee. Following discussion on that point, Delmonico suggested that Vinal might want to bring the employees at Syracuse back to work as Jandreau had done in Schenectady.[71] Mention-

[71] The Schenectady Local had returned to work that morning.

ing how popular Jandreau had made himself at [55] Schenectady, Delmonico told Vinal that he would be as highly regarded in Syracuse if he followed Jandreau's example. Vinal was then under suspension for alleged strike misconduct. When he pointed this out to Delmonico, the latter assured him that his suspension would be taken care of if he brought the employees back. When Vinal mentioned that 16 other [60] Syracuse employees were also under suspension, Delmonico replied that their suspension, too, could be discussed if Vinal was serious. Delmonico told

61

Vinal that if the employees returned to work, they would receive the benefits of the old contract, except for the escalator clause. Vinal declined to bring the employees back.[72] [5] The General Counsel in his brief refers to other instances—not detailed here—of asserted attempts by the Company to undercut national bargaining by direct dealings with IUE locals during this and earlier periods. They are found not to support the General Counsel's position on that point.[73]

---

[40] [72] The above findings are based on Vinal's credited testimony, corroborated in substantial part by employee Robert Robinson who heard Vinal's end of the conversation. Delmonico admitted having a conversation with [45] Vinal in which the Schenectady development was discussed and in which there was some talk about how Vinal would be regarded if he brought the employees back to work, but he specifically denied saying anything about lifting Vinal's suspension or that of others. Vinal had previously given substantially the same testimony without contradiction [50] at an arbitration hearing at which Delmonico was present. He impressed me as a credible witness.

[73] Thus, for example, the General Counsel refers to certain incidents at Worcester. But these establish at most a refusal to bargain with the Worcester Local on purely local issues, and do not bear on the [55] particular issues in this case. The General Counsel also refers to persistent efforts by the Lynn management to discuss with the Lynn Local the manner in which the proposed retraining and reassignment plan would be applied at Lynn. That plan, however, contemplated implementation at local levels, and it is quite clear that the local management [60] simply sought to clarify for the benefit of the Local certain proposed details which the national proposal contemplated were to be reserved for separate local negotiation and agreement.

[10] 3. Employee communications

To a substantial extent, the Company's communications to employees during the strike period were concerned with strike activities and [15] developments, advice to employees as to their legal rights to work without molestation during the strike, restatements of the Company's position on bargaining issues, justifications of its refusal to agree to outside intervention, and the like. At the same time, however, the Company continued in much the same vein as before to impress upon employees that GE's full and [20] final offer was on the table and to attack the motives of the IUE top leadership. The employees were frequently reminded that they ought not consider themselves bound by the "irresponsible" strike action which Carey had promoted in furtherance of his "personal" and "political" ambitions. Prior to October 10, the Company's communications constantly reiterated [25] that the Union's asserted "no contract—no work" obligation was a meaningless fiction; that GE employees and managers in the past had satisfactorily worked together for long periods of time without a contract; and that the absence of a contract was a matter more of concern to union officials than to employees. Beginning about that date, the communications stressed [30] how the Company's truce proposal would adequately safeguard employee contractual protections, and urged employees to contact their union officers and persuade them either to accept the Company's offer or the Company's interim truce proposal, or else to demonstrate by themselves returning to work that the "unnecessary" strike should be called off. The communications [35] also continually peppered the employees with reports of the increasing number of acceptances of the Company's offer by

other unions, of the strike's lack of success at other IUE locations, and of back-to-work movements at other plants. Stories of dissension in the ranks of the IUE bargaining committee were also reported and blown up.

62

Throughout, the Company's communications, particularly at the old line plants, continued to point up—as they had done throughout the negotiations, and even before—the precarious competitive situation with which GE was confronted. Employees were told that in view of the [5] Company's competitive situation, no enlargement of its offer could be effected without generating unemployment in GE plants. The damaging effect of the strike on employee jobs was also constantly accentuated. Mention was made without specifics of orders lost or in danger of loss, and employees were warned that a continuation of the strike would affect [10] the availability of employee jobs for months or even years to come, if not indeed permanently. In some instances the warnings of potential job loss took a somewhat different slant.

Thus, at the Oakland plant of GE's wire and cable department, [15] the plant manager in a letter to striking employees, dated October 7, stated, *inter alia:*

> Within the Wire and Cable Department, Oakland is the only plant with a significant stoppage in effect. Lowell [20] is not on strike and two-thirds of the Bridgeport hourly people are back at work.
>
> Any cable normally made at Oakland can easily be made in Bridgeport or Lowell.

[25] On October 14, in a further letter to employees, the plant manager stated, *inter alia:*

> Our Bridgeport Plant, which is an IUE represented [30] location, is completely back to normal operation and is now supplying wire and cable which *you* could have made. . . . This is a time for decision for the Oakland plant. My boss, Mr. Obert, will visit the plant this month at which time our future plans will be determined. You can [35] best assure continued operation if you are at your jobs rather than on the picket line.

At Lynn, the senior company official at that plant addressed a letter to employees on October 14, in which he pointed out that Lynn [40] management had offered to agree to a truce that would bring employees back to work, but that "your local union has refused even to sit down with us," and expressed the "hope" that the employees "will let your union officers know how you feel about this." In the course of his letter, he commented:

> [45] At the moment, some of the Lynn departments have certain contractual commitments with the United States Government and must, in the interests of critical defense programs, decide whether to have the work done here or elsewhere.
>
> [50] I'm sure you realize that if the work is moved to other plants or companies, it will be very difficult for us to get it back.

In a press release issued 2 days later, the same Lynn official pointed out [55] that GE had facilities and open capacity at other plants to do work performed at Lynn; declared that if the Lynn Local continued on strike while other GE plants were operating, Lynn would have "trouble retaining some of the operations assigned here," with a conse-

quent drying up of Lynn jobs, and expressed the "hope" that the Lynn employees would vote [60] at a forthcoming meeting to follow the example of Schenectady and return to work.

63

Q. *Negotiating meetings October 4 to October 19*

There were eight formal negotiating sessions and one further [15] sidebar meeting between October 2, when the strike began, and October 19, when the Company announced it considered an impasse had been reached and saw no purpose to further meetings.

The Company's bargaining position remained fixed throughout [10] this period. Moore summed up the Company's stand at the October 4 meeting. "Relating to the GE position," he declared, "it hasn't changed and it will not change under the threat of a strike." All efforts of the Union to induce the Company to modify its position in some respect proved futile. The Union's last-ditch proposal made on October 19 was for a settlement [15] on the basis of an 18-month contract with a 3½ percent wage increase (as opposed to the 3 percent increase offered by the Company for the first 18 months) and without any escalator clause. In rejecting the Union's proposal, the Company characterized it as "shake down bargaining" designed to force the Company to buy "peace."

[20] Various exploratory efforts by the mediators to find some compromise basis for settlement—such as for example their suggestion that the Company put a "price tag" on a 2-year contract—were rebuffed. The Company made it clear to the mediators that it saw no possibility of

[25] any movement in its offer even within the framework of its costs.

Both the General Counsel and the Union make much in their briefs of the Company's asserted refusal to supply the Union with contract language during this period. The relevant facts are set out below.

[30] At the meeting on October 1, Carey had requested that a subcommittee consisting of the Union's and Company's counsel meet to work on contract language as to items substantially agreed upon.[74] On October 6, in accordance with arrangements made, Sigal for the Union met with Hilbert and [35] Willis for the Company for the purpose of settling the definitive language of changes in the Pension and Insurance Agreement and related Insurance Plan and Pension Plan. Hilbert at that time handed Sigal drafts of the first two documents, but not of the Pension Plan. Hilbert told Sigal that the Company was still working on the pension plan changes and that it would be [40] ready in 2 or 3 days. The subcommittee did not complete its work on the available drafts on October 6. The next meeting was held on October 14. At that meeting, Sigal asked for the pension language, but it was not provided. As appears from Sigal's testimony, credited in this respect, Hilbert stated he would not produce the pension plan language until agreement [45] was reached on the documents which had been presented on October 6. No further meeting of the subcommittee was scheduled. The pension language was not delivered to the Union until

[55] [74] The Company's offer was drawn in the form of a detailed outline of its proposals rather than in the form of definitive contract language. The Company had earlier submitted to the Union a draft of proposed contract [60] language with respect to retraining and reassignment and income extension aid, but not as to other items.

October 27. There is nothing in the record to show that the delay in providing the pension plan language actually impeded the course of bargaining in any way; indeed Sigal conceded [50] while testifying that it did not.

At the meeting of October 18, the Union demanded that the Company put on the table the contract language in full in the form of the documents it was prepared to sign to settle all issues in dispute.[75] Moore refused

64

to do so unless and until the Union stated what option it wanted.[76] Moore told Carey, however, that the Company had a document that would permit agreement.

[5] Later that day the Company sent 25 copies of a proposed short form memorandum of settlement to the Union's Conference Board meeting that was being held that afternoon. The document provided briefly that the Union was to accept the Company's proposal as theretofore made, that a binding agreement achieving settlement of all issues would be executed within [10] 30 days thereafter, and that in the interim the Union would determine which of the options it would accept.

At the opening of the October 19 negotiating meeting, Carey presented the union proposal, referred to above, for settlement on the [15] basis of an 18-month contract with a 3½ percent increase. When the mediators suggested a private meeting with the Company, Moore refused, charg-

[75] At the meeting of October 1 and again at the meeting of October 5, Moore had stated that the Company had the contract language available.

[60] [76] In its teletype that day, the Company disparaged the request, stating it had "no intention of confusing the issue by putting another document on the table."

ing the mediators with having rehearsed the proposal with the Union, a charge which the mediators denied. After the Company rejected the Union's offer, accusing the Union of "shake down" bargaining, the Union [20] left the meeting and separate sessions were held until early evening.

On reconvening, Moore stated that the parties were at a legal impasse and that the Company saw no useful purpose in any further meetings. The Union objected to the Company's assertion that there was a legal [25] impasse, declaring there could be no legal impasse in the absence of good faith bargaining.

The Union thereupon again noted that the Company had refused to put on the table a document including the complete agreement it was [30] prepared to sign. Hilbert for the Company replied, "We can't do it until we have agreement," adding, "Tell us the option and we will have it on the table." Moore referred the Union to the Company's proposed short form memorandum of settlement and insisted that that was sufficient, at least to end the strike. The Union responded that the short form was too vague [35] and general "to serve as something to be binding."

At that point Carey indicated for the first time the Union's readiness to capitulate, stating he would like to have an opportunity to discuss with the Company a strike settlement agreement. He handed Moore [40] a union proposal in the form of a bilateral agreement, providing for the immediate settlement of the strike, the simultaneous execution of the new National Agreement, and various conditions and protections that were to apply to the reinstatement of returning strikers.

[45] The Company responded that the Union had put "the cart before the horse" in presenting a strike settlement agreement before reaching full accord on the National Agreement, the Wage Agreement and the Pension and Insurance Agreement. The Company stated it would not look at the provisions of the strike settlement agreement until after agreement had been [50] reached on the other agreements.

The Union then again demanded that the Company put its full contract language on the table. The Company said it would do so, as soon as the Union advised the Company it was in agreement with the Company's [55] proposals and declared the option it wanted. The Union stated it was in "substantial" agreement but was unwilling to consent in advance to a contract it had not seen. The Company replied that the Union would have to express its *unqualified* agreement to the Company's proposals, eliminating the word "substantial," before it would produce the full definitive contract language.

65

Nothing further was accomplished that day. Because of the Company's unwillingness to meet any further, the mediators, over the objection of the Union, adjourned the meeting subject to further call.

[5] R. *The strike settlement meetings on October 21 and 22*

The next meeting was held on October 21. Prior to the meeting, the company representatives met separately with

the mediators. Moore [10] reported to the mediators that the Company had completed its drafts of contract language. With respect to the Union's proposed strike settlement agreement, the Company indicated that it was prepared to go along voluntarily with some of the items of the Union's proposal in accordance with its established practice; that some of the others would be taken care of under [15] the new contract in any event; but that it saw no need for and did not intend to enter into a separate strike settlement agreement. Moore told the mediators:

> We are prepared to listen to what they have on a strike [20] agreement but our position is one of "thanks" but "no thanks." We haven't signed them in the past and we don't intend to.

At the opening of the joint meeting that day, the mediators inquired [25] if the Company had the contract language written up. Hilbert answered only "Yes." He did not, however, offer the contract draft to the Union. Nor did the Union again ask for it.

The Union then presented a new proposal which included two [30] separate agreements—(1) the strike settlement agreement it had earlier presented, slightly revised, and (2) a short form memorandum substantially in the form submitted by the Company on October 18, except for an item calling for elimination from the Company's proposal of the retraining provision.

[35] In presenting the Union's proposal, Carey expressly acknowledged his awareness that the Company was now

pect of getting local agreements on retraining would be [40] improved if limiting language were removed from the National Agreement.

As previously noted, the Company during the early days of September had indicated its willingness at least to consider dropping retraining from its offer if that were the wish of the Union. But after [45] the resumption of negotiations on September 20, the Company had insisted that that provision *must* be part of the package notwithstanding the Union's request for its removal. At the October meetings, the Union had continued to press for the deletion of the retraining provision. It had argued that as retraining was not to be put into effect at any location unless the [50] details were agreed upon in local negotiations, and as local supplements were subject to national approval in any event, the National Agreement should at most authorize local negotiations and should not impose limitations that might hamper the freedom of local unions and local managements to negotiate fully in the light of their particular local situations. The [55] Company, however, had refused to modify its position and had remained unyielding.

Now, with the Union's complete capitulation at hand, the Company relaxed its position. Moore told Carey that he would reserve comment on [60] Carey's request for reconsideration. At the final meeting the next day, the Company advised the Union that it was deleting the retraining and reassignment provisions from its proposal and leaving the subject entirely for local negotiations.

On October 21, after discussing briefly the Union's proposed memorandum of settlement,[77] the parties turned to a consideration of the strike settlement agreement. The Company adhered to its expressed opposition to the execution of a separate strike settlement agreement. [5] But it nevertheless discussed with the Union the various items in the Union's proposal, stated its views thereon and gave its reasons for such views. It indicated its agreement in principle as to some of the items, its objections as to others.

[10] At the opening of the meeting on October 22, the Union presented a single document labeled "Memorandum of Settlement," which combined in one instrument the provisions of its strike settlement agreement and of its memorandum of settlement as previously proposed. The Union explained that the revision in form was made to meet the Company's objection to a separate [15] strike settlement agreement.

The Company then announced that in the place of the strike settlement agreement theretofore proposed by the Union, it was prepared to give the Union a "letter of intent." It presented a draft letter stating [20] how the Company "intends to handle certain matters relating to the resumption of work." The letter provided more specifically, (1) that strikers would be recalled "as quickly as their services are needed"; (2) that strikers would not be discriminated against merely for strike activity; (3) that

[55] [77] Two points were specifically touched upon. One involved the question of retraining which, is already noted, was temporarily left open. The other concerned the effective date of the new contract. Moore suggested October 17, in accordance with the Company's offer to make [60] it effective on Monday of the week agreement was concluded. The Union wanted October 24, apparently on the theory that the earlier date could only benefit nonstrikers. Moore was agreeable to accepting the Union's date.

penalties imposed by GE *after* the end of the strike for [25] strike misconduct would be handled in the usual way under the new contract and be subject to arbitration; (4) that all pending criminal prosecutions and court and administrative processes based upon strike misconduct would "continue to follow their natural course"; (5) that the Company "has carried employees insurance coverage during the strike and will make the necessary [30] adjustments in order to reimburse itself"; (6) that "in accordance with long standing practice" strike absence would be included for relative seniority standing but not for computing employee benefits"; and (7) that grievances pending or based on action taken before the expiration date of the last contract would be processed in the regular way with time periods [35] tolled. To the foregoing, the letter of intent added that the Company had "offered to make the wage increase effective October 17" but "that the Union has, for reason of its own chosen the October 24th date." In short, the letter revealed that the Company was in agreement with many but not all the provisions the Union had asked to have included in a strike settlement. [40] The Union strongly objected both to the form of the document and to its failure to provide the full measure of protection embodied in the Union's proposed strike settlement agreement.

With respect to the substantive variances, the Company, in the [45] course of the discussions which followed, listened to the Union's arguments and stated its own reasons for the positions it had taken. On one point, it yielded to the Union's position, and added to its letter of intent a provision that discharges for strike misconduct effectuated during the period of the strike would "be subject to arbitration under voluntary [50] arbitration submissions which the

Company would be willing to sign." Throughout, however, the Company adhered to its position that it would not agree to a strike settlement agreement, labeled as such, but would agree only to have the strike settlement provisions embodied in a letter of intent.

67

To the Union's objection that the letter was not a legally binding agreement but only a unilateral statement of intention, the Company responded the Union could, if it wished, initial the letter and thereby, it said, make it a letter agreement. It is quite clear, however, that [5] the Union was opposed to signing the letter both because of its unilateral form and because of some of its content. Sigal requested at one point that the Company drop from the letter the provision that pending criminal prosecutions and court and administrative processes would follow their usual course, pointing out in effect that this was simply surplusage [10] adding nothing to the Company's undertaking. The Company refused. "We'll leave the letter as it is," was all Moore would say.

At the hearing, the Respondent gave no persuasive explanation as to why it was opposed to a strike settlement agreement in bilateral form. [15] Hilbert testified—although he did not mention this at the negotiations—that the Company probably would not have opposed a bilateral agreement labeled "Return to Work Terms." The significance of the distinction escapes me.

[20] In the end, the Union yielded to the Company's terms. On the afternoon of October 22, it signed along with the Company the short form settlement agreement. The Company alone signed the letter of intent. Up to that time,

the Company had not yet presented to the Union, save in the partial respects referred to above, the actual contract language. It was [25] agreed that counsel for the parties would meet in the very near future to work out the contract language, but that the National Agreement would go into effect immediately without awaiting the final execution of the formal documents; also, that existing checkoff authorizations that had not been revoked would continue in effect. Apart from contract language, two matters [30] were specifically left open for later negotiation—one concerned Article XI, Section 3, the other the revision of the checkoff provision. These will be considered shortly below.

The Union terminated its strike as of Monday, October 24, 1960.

[35] S. *Postsettlement meetings*

Postsettlement meetings were held on October 27, 28, November 2 and 3, primarily for the purpose of reaching agreement on definitive contract [40] language. Several disputes arose during this period as to substantive terms of the agreement. It is claimed by the Union, more than by the General Counsel, that the Company's bad faith approach to bargaining spilled over into this period. The Respondent, oppositely, points to a number of asserted changes and modifications made by it in the postsettlement [45] negotiations as being the clearest evidence of its good faith throughout. Reserving evaluation for later, I turn to a consideration of the pertinent facts.

As noted above, two items were specifically left open at the time [50] of the strike settlement. Both involved at

least in part considerations of illegality arising out of then recent Board decisions.

One concerned Article XI, Section 3, of the 1955 agreement, reading in pertinent part as follows:

> [55] Employees—transferred to jobs outside the bargaining units may be returned to their former classification in the bargaining unit in accordance with their total length of continuous service. Employees in any plant who have been certified in a [60] bargaining unit not covered by this agreement shall have no rights under this agreement.

68

The Union in its original contract proposals had sought revision of this entire clause to provide without more that employees transferred out of any bargaining unit would lose their seniority in that unit. The Company in its offer had made no reference to the Union's request. So far as [5] appears, there was no discussion at all about this particular provision until the meeting of October 11, when fleeting reference was made to it as a result of a then recent claim made by the Union in an injunction action at Lynn that Article XI, Section 3, was unlawful under the Board's *Menasco* rule (123 NLRB 627).[78] At that meeting, the Company had indicated [10] its willingness to delete the second sentence of the section to cure the asserted illegality under *Menasco*. The Union's objection to Article XI, Section 3, went further, however, and it was ultimately agreed that the subject would be reserved for later negotiation.

---

[60] [78] Hilbert testified that the Company had known of the Menasco decision since 1959, but was waiting for the Union to raise the subject during negotiations.

The first sentence of the section had originally been written into the contract in 1950 at the [15] request of the Company and the qualifying second sentence had then been added at the request of the Union. At the postsettlement meetings, the Union sought to negotiate a new provision in line with its demand. The Company's representative stated that negotiations were not in order at that stage. However, the Company was willing, he added, to eliminate the [20] illegal sentence if the Union wished, but there would be no other change. During the discussion that followed, however, the Company fully stated its reasons for desiring retention of the first sentence, principally that its removal would discourge rank-and-file employees from accepting supervisory positions and thus hamper promotion from within. The Company did not yield [25] further, the Union finally did, and Article XI, Section 3, was retained except for the deletion of the second sentence. The Respondent in its brief cites this change as a concession. Actually the change was an improvement from its point of view.

[30] The other item left open involved a checkoff provision. The old contract had required an employee to give notice to the Union as well as the Company of revocation of his checkoff authorization. The legality of that requirement was then in question because of the Board's decision in *Boston Gas Co.*, 129 NLRB 369, October 12, 1960; later reconsidered and [35] reversed, 130 NLRB 1230, March 6, 1961. Here the Company simply accepted the Union's suggestion to eliminate a requirement which both parties then believed had to be surrendered to comply with law. The Company gave up nothing.

[40] During drafting, a dispute arose over the Company's proposed contract language relating to the eighth holiday

which was to be allowed if the Union chose the vacation-holiday option. Holiday dates in the past had always been negotiated. Nothing had been stated in the Company's option offer to the contrary. Moreover, at the October 1 meeting Moore had stated [45] that the Company proposed to have holidays negotiated locally. Nevertheless, the contract language submitted by the Company gave local management the exclusive right to determine the eighth holiday without negotiation. The Union protested. The Company justified its position principally on the ground that that was the only way to assure uniformity in plants where [50] there was more than one union. The Company held fast to its position through several meetings, but the parties finally agreed on Washington's Birthday as the eighth holiday, subject to the right of local management and the local union to substitute a different holiday by mutual consent.

[55] A dispute also arose with regard to a letter known as the 20.4 letter, which had been attached to the 1955-1960 agreement, and which stated in substance that the parties were in disagreement over a company policy relating to the arbitrability of discharges of employees who had

invoked the Fifth Amendment in certain circumstances. The Company requested reacknowledgment of the letter. The Union objected on the ground that there had been no reference to the matter in negotiations. The Company, on the other hand, took the position that when it made its offer, which [5] the Union accepted, it was its intention, as the Union should have understood, to retain everything in

the old agreement not specifically mentioned, and that the letter was part of that agreement. It flatly refused to reopen that item for negotiation at that stage, but in an effort to accommodate the Union did submit three different forms of [10] reacknowledgment of the 20.4 letter, one of which the Union ultimately accepted over protest. Sigal for the Union ultimately conceded while testifying that if the letter had not been reacknowledged, it would, by enlarging the area of arbitrability, have resulted in a change of the 1955 agreement in a respect not specifically reserved for further negotiation [15] after the settlement date.

Another issue arose with regard to the inclusion under the agreement of two locations, Bucyrus and Burlington, involved in decertification petitions that had been filed prior to October 22. The Company's [20] offer had provided that its terms would not be made applicable to employees in any bargaining unit "where there is pending an NLRB representation petition without a waiver of objections by any other interested union." The Company questioned the legality of listing Bucyrus and Burlington among the contract-covered units in view of the Board's *Midwest Piping* doctrine[25] (63 NLRB 1060). Sigal for the Union expressed his legal opinion that that doctrine did not apply to decertification cases. The Company, after considering this matter, agreed to include Bucyrus and Burlington.

In addition, the Company, during drafting, agreed to a few minor [30] changes not theretofore negotiated. One provided for emergency meetings at the third step (national) of the grievance procedure if the Union requested it. A second provided for written answers at the second step

of the grievance procedure. But this only restated a long time general practice, and was requested because one local management was lax. The third [35] change provided authority for local managements to *negotiate* with local unions for travel allowances in excess of 8 cents per mile. The Union had asked for 10 cents per mile nationally, and this had been rejected. Under the change, as construed by the Company, however, a local union, while free to demand a higher allowance, could not strike in support of its [40] demand if negotiations failed.[79]

The formal agreements were finally concluded and executed on November 10, 1960, after the Conference Board elected the holiday-vacation option on a local-by-local basis.

70

T. *Alleged threat and discrimination at Augusta, Georgia*

At the Company's Augusta, Georgia, tube plant,[80] the plant [5] manager on October 5, 1960, sent a letter to three local union officials and one other employee, who at the time

[45]. [79] The Company's brief lists two other relatively inconsequential "changes" or "additions," as to the origin of which there is no specific record evidence, however. One, contained in the new contract, but not found [50] in the old one, provides that time paid for death-in-family absence shall be counted as time worked in computing vacation pay. The Company in its brief cites no evidence, nor have I been able to find any, to show that the Union ever asked for this or that it was ever a subject of discussion. The other listed item also, so far as appears, was never [55] requested by the Union. It was first included in a draft submitted by the Company about September 20 relating to its income extension aid proposal. The item relates to situations where on *plant closings* a laid-off or terminated employee who is then within 1 year of optional retirement—60—may instead of termination pay elect to take optional [60] retirement when he reaches optional retirement age. The asserted "change" or "addition" simply provides that such an employee would have his service (recall rights) protected until he reaches such age. But this seems to have little meaning because the only plant to which he can be recalled is closed.

[80] This is a small plant. At the times here relevant there were only 60 employees in the IUE unit at that plant.

were the only employees on strike, stating that if they did not return to work by the start of their regular shift, Monday, October 10, their employment with GE would be terminated and replacements would be hired. Thereafter, on October 13, 1960, the [10] plant manager sent the same four employees telegrams, followed by confirmatory letters, in which he asked them to disregard the aforesaid statement in the October 5 letter, informed them that their service with GE had not been terminated, but added that if they did not return to work by the following Tuesday, their positions would be filled by new employees. In the meantime [15] a Board agent had directed the attention of Hilbert, G. E's labor relations counsel, to the October 5 letter, and Hilbert in turn had communicated his views to the plant manager as to the propriety of the October 5 letter.

More employees at Augusta joined the strike after October 5, [20] including the 20 employees whose names are listed in the complaint and in Appendix A, hereto attached.

On October 24, 1960, the 20 listed employees made unconditional offers to return to work, but the Company failed and refused to reinstate [25] them. While on strike, all of them had been replaced by other employees.

On October 31, the Company offered employment to one of the listed employees—W. A. Chalker—conditioned upon his ability to pass a physical examination. On November 3, Chalker was reemployed and assigned [30] to his old job at his old rate of pay. On November 4, 1960, the Company offered employment to another—J. L. Cline—subject to the same condition. Cline did not pass the physical and was not reinstated. Thereafter, on November 5, the Company

offered employment to Lonnie M. Usry, who, after passing the physical, was reemployed on November 7, 1960, in his former [35] classification and at this former rate of pay, but on a different shift.

It is GE's general practice to require physical examinations of employees away from their jobs for more than 2 weeks. However, at the conclusion of the 1960 strike, the Company did not generally apply that [40] practice. So far as appears, it was applied only at the Augusta plant.

The complaint alleges that the Company independently violated Section 8(a)(1) by reason of the October 5 letter, and 8(a)(1) and (3) by its refusal to reinstate the Augusta strikers. It appears to be generally [45] conceded by all parties that the resolution of the discrimination issues in this case must turn on whether or not the strike is found to have been an unfair labor practice strike. That issue, as well as the independent 8(a)(1) issue, is deferred for later consideration.

[50] U. *The alleged independent violations of Section 8(a)(5) and (1)*

1. Preliminary statement

[55] As noted in the statement of the case, above, the complaint alleges broadly that the Respondent violated Section 8(a)(5) by reason of its overall bad-faith dealing with the Union, as reflected by its conduct both at and away from the bargaining table. Without limiting the generality of the broad claim, the complaint also contains a number of [60] specific allegations. Three of such specific allegations are relied upon

by the General Counsel not only as lending support to the broad bad-faith bargaining allegation, but also as spelling out in themselves independent violations of Section 8(a)(5) and (1). Two relate to the Respondent's failure and refusal to supply information requested by the Union; the [5] third, to the Respondent's attempts to engage in direct bargaining at local levels in derogation of the Union's status as national bargaining agent.

Before proceeding to an analysis of the central issue of [10] overall bad-faith bargaining, I shall consider first the alleged independent violations.

2. Refusal to furnish information

[15] a. *The specific allegations of the complaint*

Numerous references have been made above to the Company's reactions to union requests for cost and other information during the course of negotiations. All of them are relied upon by the General Counsel—he so [20] made clear at the hearing—as evidence of an attitude antithetical to good-faith bargaining. But the specific items on which he would predicate findings of independent violations are those alleged in the complaint as follows:

[25] [12] f. Since on or about August 31, 1960, Respondent has refused timely to furnish to the Union data in its possession requested by the Union on August 31, 1960, and at various times thereafter, relating to the cost of a fourth week of vacation for employees [30] with more than 20 years of service.

g. Since on or about September 22, 1960 . . . Respondent has refused timely to furnish to the Union data . . . relating to: (1) The cost of various pension and [35] insurance proposals; (2) The number and categories of laid off and recalled employees for each of the units described in Appendix A; and (3) the number of employees in each of such units with between 20 and 25 years of continuous service with the Respondent.

[40] The facts relating to the foregoing allegations, although heretofore touched upon in part, have not yet been fully developed. This will be done now.

[45] b. *The applicable facts*

The facts with respect to 12(f) are as follows: On August 24, 1960,[81] during a discussion of the Union's vacation and holiday demands, Jandreau for the Union asked the Company to "get for us the actual number [50] of people that you have with one year of service and the actual number of people you have with 20 years of service so we can understand the problem." Shortly thereafter, Carey made it clear that the Union desired the information to determine the costs in cents per hour of the Union's demand for a fourth week of vacation for employees with 20 years or more service, [55] pointing out that the Company had put costs in issue by labeling the Union's demands as "astronomical." In response to Jandreau's specific request, Hilbert stated, "I don't think we have that information," adding that the Company had already spent a considerable

[60] [81] The August 31 date alleged in the complaint is inexact, but the variance is found immaterial.

sum in supplying other information to the Union earlier that year. Although Jandreau stated his belief that

72

the Company did have the information, Hilbert expressed no willingness to find out. The ensuing discussion of the Union's request was in terms of companywide costs, the Company making clear that any benefits it offered the Union would also have to be extended to other employees. The record [5] shows that the Company actually had at its New York headquarters figures showing the number of employees with 20 years' service on a companywide basis. It did not have such figures broken down according to IUE units. But even if it interpreted the Union's request to call for that breakdown, such information was readily obtainable through plant location sources.

[10] At the August 31 meeting, Jandreau repeated his request of the week before, explaining that he wanted that information because the Company was so concerned about costs. Moore's only reply was that the Company "discussed the level of benefits."[82]

[15] As will later be shown, the Company did not provide the Union with the information first requested on August 24, until more than 2 months later, after the end of the strike.

[20] The facts with respect to paragraph 12(g) of the complaint are as follows:

---

[55] [82] Moore testified that the Company did not regard information requests "as serious requests until they are pressed through a letter." But Moore did not tell this to the Union, basing the refusal on another ground. There is no record support for the assertion in the [60] Respondent's brief that it was the "uncontroverted practice" of the parties to require consideration only of *written* requests.

Prior to September 22, the Union made a number of oral requests for information relating to the costs of the Company's overall offer. The [25] Company's response invariably was that it did not know, or that it bargained on the level of benefits, not costs.

At the meeting of September 8—the last one before the IUE convention—the Union, during a discussion of its request that a modified [30] SUB program be substituted for income extension aid, sought information as to the number of employees who might be expected to benefit under the Company's IEA proposal. More specifically, it asked for the number of employees who on the basis of the Company's past 2 years' experience were laid off for more than 6 months and who would, therefore, have qualified [35] under the Company's proposed IEA plan. Moore replied, "Somewhere between zero and 100%." When the Union persisted, Moore stated that the Company would take the Union's request under consideration if it were made in writing.

At the September 22 meeting, Carey handed Moore a letter requesting [40] the following information with respect to the employees in each of the GE bargaining units represented by the Union and its locals:

A. Cost per employee, and also for employee dependents, of each proposed new insurance benefit, and or each proposed [45] increment in existing benefits, broken down into:

(1) Cents per month premium, and

(2) Cents per month net cost estimated on basis of the [50] Company's 1959 experience.

B. Cost in cents per hour per employee of the proposed increment in each of the pension benefits.

73

C. Number of employees on the Company's recall list as of June 30, 1960, for

(1) Less than 6 months

(2) More than 6 months and less than 1 year

(3) More than 1 year

D. Number of employees who have been recalled since January 1, 1960, and who, prior to their recall, had been laid off.

(1) Less than 6 months

(2) More than 6 months

(3) More than 1 year

E. Number of employees with (a) 20 years (b) 25 years or more [20] continuous service.

The letter stated that the information requested was necessary to allow the Union to "appraise the cost of [GE's] proposals" and "determine the number of people who might benefit by them." The Union asked that this information [25] be furnished without delay.

After reading the letter, Moore said that the request only repeated items that had been asked for previously; that the information was not pertinent; and that the Company either did not have it or would have to [30] go to great expense to get it. He declined to comment specifically on any separate item in the request, but said the

Union would receive a reply to its letter. Hilbert asked how the information requested would advance bargaining. The union representatives answered that complete information always advanced bargaining; that, for example, a showing that the difference [35] in cost was slight would advance the Union's position that an extra week's vacation should be granted after 20 years' instead of after 25 years' service. The Union also pointed out that the Company had talked of costs when the Union was presenting its demands, but that now that the Company's offer was in, the Company talked in terms of level of benefits.

[40] The Company treated the Union's request both casually and with extreme literalness. Sometime during the following week, on September 26 or 27, Hilbert made inquiry of the Company's Accounting Services consultants as to the availability of the requested information. The [45] pension consultant was asked if the information was available in *the form requested.* He said it was not and that it would be a major job to compile it in that particular form. He was asked no further questions. The insurance consultant also stated that he did not have the requested information *in the form requested.* He was asked no further questions. The consultant [50] handling layoff and other information said the information *in the form requested* was not available in New York and would have to be obtained by contacting the plant locations. Hilbert, as appears from his testimony, told that consultant not to bother doing anything further at that time. His stated reason: He was hopeful the Union would drop the whole thing [55] after the Company submitted its reply.

With respect to the availability of the specific information in the form requested, the record shows the following:

[60] The Company's insurance plan was maintained on a companywide basis. It was administered by an insurance carrier under a contract providing for negotiated premium rates for each type of coverage. The negotiated rates were, however, subject to revision based upon actual experience, so that its

74

actual costs, over any given period, could not be determined until the experience was incurred. On the basis of the negotiated rates the Company could have responded to item A(1) since the premium rates were alike on any given coverage for all participating employees throughout [5] the Company.[83] With respect to data requested in A(2), the Company had available its estimated costs for each proposed increment in existing benefits on a companywide basis. The Company does not maintain separate experience information tied to separate IUE units or locations. For it to have produced separate cost estimates on that basis would have involved [10] a substantial cost (estimated at the hearing at $65,000) and many months to compile. Because of variable experience factors, the actual cost at one location will of course differ from that of another. But the Company operates its insurance plan on a companywide basis as a single plan and computes its own costs, just as the insurance carrier computes its [15] pre-

[55] [83] It is noted, however, that only one of the Company's proposed insurance changes—an increase in maternity benefits—involved a change in premium rate. Three others involved changes in the relatively share of overall insurance costs to be borne by the Company under the contributory plan, but no added premium. They were waiver of contributions for laid-off [60] employees with 3 or more years' service; 31 days continuation of dependent coverage for dependents of deceased employees; and waiver, for 1 year, of contributions for dependent coverage for totally disabled employees. The final change—medical expense conversion privilege for terminated employee—involved no added premium or cost.

miums, without group distinctions based on locations or bargaining units. The company witness conceded at the hearing, that on the basis of the available companywide estimates, it would have been a matter of simple arithmetic for the Company to have calculated the average cost of the insurance improvements, in terms of costs per hour per employee, on a [20] companywide basis. The Company had no certain knowledge that this would not have satisfied the Union.

What has been said about the insurance information applies equally to the pension cost information requested in item B of the Union's [25] letter. The pension plan also is operated on a companywide basis and the Company makes its cost computations and estimates on that basis. Of course, on a fragmentized basis, the average per employee cost would differ from unit to unit because of such variables as average length of service, earnings, turnover and the like. For the Company to have gathered the [30] information and made the actual studies to determine the cost per hour per employee of the pension benefit increments for each IUE unit separately would have cost it—according to an estimate it has since made—several hundred thousand dollars and have taken months to compile. But the Company on the basis of the companywide estimates it had on hand could have readily [35] provided the Union with average cost per hour per employee figures. When pension information had been offered the Union in the past on a companywide basis, the Union had accepted it.

As for the information referred to in items C, D and E, it appears [40] that the Company also had such information

available at its New York headquarters compiled on a companywide basis, but without any separate breakdown for IUE units. The information in the specific form requested was readily obtainable from plant locations. Although this would involve some delay, the expense and effort of getting it would not have been unduly [45] burdensome.

To resume the chronology of events: At the September 27 meeting, Carey complained about the Company's failure to supply the information the Union asked for in its September 22 letter, again pointed out the Union's [50] need for the information, and requested the mediators' aid in obtaining it. Moore told Carey, "You'll get the information when we get it, Mr. Carey, or if we feel we should get it for you."

75

On September 28, Moore in a letter to Carey expressed surprise at the IUE's September 22 request, complained of its "eleventh hour timing," stated that the Company had referred the Union's request to its accountants to determine the availability of the information, and said it "should have [5] this answer within a few days."[84] The letter then went on to comment on specific items embodied in the Union's September 22 request.

As for the information requested in items A and B, the letter stated that the information was "not available," that it was "on its face [10] purely speculative," and that, furthermore, "the cost to *the Company* of any of its proposals [had] no proper place in our negotiations." The

[40] [84] This does not square with Hilbert's testimony, earlier referred to, that the Company had already received a report from its accountants.

Company did not disclose that the reason for the asserted unavailability was that it kept its records and prepared its cost estimates on a companywide basis.[85] It neither offered the information in the alternative forms that were [15] available nor inquired whether the alternative forms would satisfy the Union's needs. Its reticence here is in sharp contrast with its conduct during the prenegotiation period when, as earlier found, it displayed a cooperative attitude with regard to furnishing union-requested information.[86] [20] As for items C and D, the letter simply stated that it "would probably take some time to dig out" the information.

As for item E, the letter stated that the Company did not have [25] the figures available on a unit-by-unit basis, but added that the Company's "accounting people a few weeks ago set out to make a companywide estimate in response to an oral request for companywide figures from one of the members of your bargaining team." The letter reported that the estimate so made indicated that the number of employees with 25 or more years' service [30] averaged just under 10 percent of the Company's employees. The letter did not report the percentage of employees with 20 or more years' service. Actually, the only "oral request"

---

[85] Compare the Company's disclosure of that fact with respect to the 25-year service information, *infra*.

[45] [86] On March 7, 1960, the Union had made a written request for information relating to layoffs and other matters. The information was requested for each bargaining unit on a monthly basis. When the Company sent the Union some of the information on April 8, 1960, much of it was not in the form specified. As to other information, the Company then explained:

[50] Although the precise information requested cannot be obtained without undue expense, we can provide that type of information . . . on a plant-by-plant basis rather than a unit-by-unit basis. If you believe such substitute information will be useful to you, please let us know and [55] we will have it put together.

Later, the Union informed the Company it would accept the information in the form convenient to the Company.

made "a few weeks ago" was for employees in the 20-year bracket. Hilbert admitted, while testifying, that the Company had readily available at that time information that would have enabled it to [35] provide an estimate of the percentage of employees in the 20-year bracket on the same companywide basis. The Company gave no explanation for its failure to provide that figure, even though it was aware of the importance attached to it by the Union, to advance its position that a fourth week of vacation should be allowed after 20 rather than 25 years' service.[87]

76

At the October 7 meeting, the Union renewed its request for the information referred to in its letter of September 22. In response, Moore told the mediator that the Union had already received the Company's answer. To this, Hilbert added that since the matter was now before the National [5] Labor Relations Board, the Company would let the Board take care of the request.[88] No other reason was given.

The Company admittedly made no effort at any time to obtain the information called for in items A and B of the Union's written request. [10] It took no active steps to collect the information requested in items C, D and E until after the end of the strike.

---

[87] Both figures were needed by the Union to calculate the difference in costs. The relevance of this cost information is pointed up by what the [60] Company was telling employees in its communications. It will be recalled that in a talk to Schenectady employees on September 21, Stevens emphasized the "very sizeable increase in cost" that would be involved in extending the fourth week of vacation to 20 years service employees, adding that the Company could not incur the added cost without [50] jeopardizing the future of its business and the security of employee jobs.

[88] On October 4, the Union had filed a refusal-to-bargain charge based in part upon the Company's refusal to supply requested information.

At the contract drafting meeting on October 27, Hilbert asked Sigal if the Union was still interested in receiving the information [15] requested on September 22. Sigal said, yes. Hilbert then said the Company would not provide the information requested in items A and B but would supply the rest. Thereafter, the Company furnished the Union with information on the 25-year service employees in two installments, on October 28 and November 7. Reports on the balance of the C, D and E [20] information were furnished on November 7, 1960, and February 10, 1961.

c. *Consideration of Respondent's defenses and concluding findings*

[25] There can be little doubt that all the information requested in the Union's September 22 letter was both relevant to matters under negotiation and necessary to enable the Union to bargain intelligently. The cost of the added pension and insurance benefits requested in items A and B was relevant and necessary not only to enable the Union to appraise the value [30] of the economic package the Company was offering, but also to allow it to assess the validity of arguments the Company was making, such as, for example, the Company's contention that its economic offer compared favorably in value with then current wage settlement patterns. Further, notwithstanding the Company's claim made whenever cost information was sought that it [35] considered only level of benefits, much of the Company's justification for its offer both in and out of the conference room, and particularly in its communications to employees, was based on overall costs and the asserted

jeopardy to the success of its business and to employee jobs that any enlargement of the costs of its offer would entail. In so doing, the Company [40] itself made costs a relevant bargaining issue. The Respondent's contention that the costs to an employer of pension and insurance programs, as distinguished from the employee benefits thereby provided, are unrelated to wages and conditions of employment and therefore of no concern to employees, has been considered and rejected by the Board in earlier cases holding that [45] an employer is obligated under the act to make such pension and insurance cost information available to a union.[89] The information requested in

77

items C and D was quite clearly relevant and necessary for an intelligent appraisal by the Union of the Company's income extension aid proposal, both with respect to the number of employees who stood likely to benefit from it—the precise information sought—and the probable cost of that [5] proposal to the Company. The information was pertinent, moreover, to the issues arising from the Union's demand for SUB as an alternative to or in conjunction with income extension aid. The 25-year service information

[89] *Sylvania Electric Products, Inc.*, 127 NLRB 924; *John S. Swift Co., Inc.*, 124 NLRB 394; *Stowe-Woodward, Inc.*, 123 NLRB 287; *Phelps Dodge Copper* [55] *Products Corporation*, 101 NLRB 360. Although *Sylvania* was reversed by the First Circuit in *N. L. R. B. v. Sylvania Electric Products, Inc.*, 291 F. 2d 128—the case upon which the Respondent principally relies—the Board has since expressed its nonacquiescence in the court's decision. *Electric Furnace Co.*, 137 NLRB No. 120. Moreover, the instant case is [60] distinguishable from the court's decision in *Sylvania* because here, unlike *Sylvania*, costs were in issue and, besides, the benefits plans were contributory. True, the costs of proposed new increments in the benefits plans were to be borne entirely by the Company. But such added [55] costs affected the proportionate shares of the total costs payable by the Company and the employees respectively as joint contributors. The extent to which they did so were matters of relevant interest to the Union and information it was entitled to have. *Phelps Dodge* [60] *Copper Products Corporation, supra; Skyland Hosiery Mills*, 108 NLRB 1600.

requested in item E was obviously necessary to allow the Union to compare the value of the holiday-vacation options with the 1 percent wage reduction [10] the Union would have to yield as the price therefor; also to assess the value of the options in terms of the number of employees who might benefit thereby. The particular relevance of the 20-year service information requested in the same item has already been pointed out above.

[15] As shown, the Company refused to provide any of the information called for in items A and B, just as it had theretofore consistently refused to supply any other information relating to the costs of its offer. As to those items the Company defends its refusal on three grounds.

[20] First, it contends that cost information as to its pension and insurance proposals could not be legally required because employees were not being asked to bear any part of the cost of the new increments. That contention is rejected on the authority of the Board's decision in *Sylvania* and for other reasons set out above.

[25] Secondly, the Company contends that the information sought was "speculative." It is quite true that, except for the premium figures, the information requested in items A and B was aimed at obtaining cost estimates, the accuracy of which could not be determined with finality until after [30] actual operating experience. But, estimates are not "speculative" except in the loosest sense of the term, simply because they are estimates. And particularly is this so where the estimates are based on the application of actuarial standards as in the case of pensions and insurance. In composing its offer the Company considered the cost estimates prepared by its experts [35] as sufficiently

reliable for it to support a business judgment thereon. The Company was not being asked to guarantee that future experience would prove its cost projections accurate. The fact that the estimates might be subject to a possible margin of error neither destroyed their value to the negotiators nor excused their withholding.

[40] Finally, the Company defends on the ground of unavailability. The Company, to be sure, did not have and could not have produced without undue burden the requested cost information predicated on the artificial assumption that each IUE unit also constituted a separate pension and [45] insurance unit for purposes of actuarial computations. But it did have estimates from which it could have readily furnished the per employee cost information computed on a companywide basis. The latter would have conformed to the unit basis on which the Company operates its insurance and pension plans and computes its premium and other costs thereunder. In these [50] circumstances, the Company was not obliged to furnish the information requested in the exact form called for by a literal reading of the Union's letter. But if the Company's strict construction of the Union's request was in truth the basis for its refusal, minimum standards of good faith

required the Company at least to inform the Union as to the specific reason for unavailability, to disclose the alternative basis on which such information might be made available, and to inquire whether that alternative would be acceptable.[90] In the past, the Union had accepted information

[55] [90] *J. I. Case Co.*, 118 NLRB 520, 523, enfd. 253 F. 2d 149 (C. A. 7); *Peyton Packing Co.*, 129 NLRB 1358, 1362. *Cf. Old Line Life Insurance Co.*, 96 NLRB 499, 502-503.

[5] in alternative forms where it was not available in the precise form requested. The Company had no affirmative basis for belief that the Union would not also have done so in this instance rather than get no information at all. The Company's consistent prior refusals to comply with oral requests for cost information—assertedly on the ground that only levels [10] of benefit were relevant—as well as the additional reasons stated for its refusal in this instance, confirm that the Company's true reason for withholding the information which it did have available, and which would have substantially met the purposes of the Union's request, was not unavailability but unwillingness to disclose the cost information to the [15] Union in *any* form. I find on all the evidence that the Company's failure to tender the cost information it had available on a companywide basis constituted bad faith.

As found, the information called for in items C, D and E was [20] eventually furnished, but not until after the end of the strike when it no longer had value in the negotiations. The law is of course clear that the obligation to furnish on request relevant information must be honored within a reasonable time and is not satisfied by late submission where diligent efforts to furnish it timely have not been made.[91] The Company [25] stresses that it did not have the information in the form requested available in New York and had to collect it from IUE locations. That is true. But the record does not support a finding that this would have imposed an undue burden on the Company. All its New York headquarters had to do was to broadcast a letter or teletype request to the plant locations; the rest

[91] *Utica Observer Dispatch, Inc.*, 111 NLRB 58, 63, enfd. 299 F. 2d 575 [60] (C. A. 2); *Reed & Prince Mfg. Co.*, 96 NLRB 850, 853, enfd. 205 F. 2d 131 (C. A. 1).

[30] was merely a matter of mechanical collection from records already at hand. The important fact is that GE headquarters chose to wait more than a month until after the strike was over before it so much as initiated the process of collection by communicating a request for the information to IUE locations. In an attempt to justify the long delay, the Company adduced [35] testimony to the effect that it was decided on September 29 not to send out a request to the locations because the locations were then busily engaged in making preparations for the strike that appeared then to be imminent, and that nothing further was done during the strike because the Union was engaging in mass picketing and violence at some of the locations, thereby [40] restraining administrative personnel as well as other employees from coming to work. The foregoing explanation, even if credited, would not of course account for the Company's inaction during the week preceding September 29. And as for the period during the strike, the asserted difficulties in collecting the data are at best theoretical because the Company concededly [45] made no effort to do so, not only at these plants where the Union is said to have engaged in mass picketing and violence, but at numerous other plants where no such conduct is charged. At any rate, the explanation so given, stated for the first time at the hearing, impressed me as one contrived in retrospect, and I do not credit it. It seems to me that if [50] that were the true reason for the Company's inaction, the Company would not have hesitated to declare it to the Union. Yet on October 7, when the Union repeated its request for the information, the Company made no mention of any such reason to explain its failure to comply. The only reason then

given was that the Union had filed a charge with the Board and that the Company would now let the Board take care of the request. That position of course is indefensible. An employer's obligation to bargain is not suspended by the filing of charges.[92]

[5] The other defenses urged by the Company as to the C, D and E information relate, not to the delay, but to the Company's claim that it was under no obligation to honor the Union's request at all. Thus the Company suggests that it was free to ignore the request because the request [10] was untimely "both in terms of its remoteness from the start of bargaining and its proximity to the end of the contract." But that position is patently untenable, particularly when one considers the specific bargaining issues to which the desired information was related and the prior oral requests which had been disregarded.[93] The Company further contends that [15] the information was not available at company headquarters and would have taken some time to collect. But the fact is that the company negotiators did not so much as check with the plant locations to determine how long it would take, let alone asked for it, despite the conceded relevance of this information to bargaining issues. Quite clearly the Company did not [20] consider the task of collection an "unreasonable burden" once the Union had capitulated and bargaining was over. The Company in its brief also contends that all of the information

[92] *Samuel Bingham Sons Mfg. Co.*, 111 NLRB 508, 510, enfd. 277 F. 2d (C. A. 5).

[93] The recall information related primarily to income extension aid which [45] was first placed on the bargaining table on August 30. An oral request for the same information had been made on September 8. The 25-year service information related to the holiday-vacation option which was first *formally* put on the bargaining table on September 20. The 20-year service information had been orally requested as far back as August 24.

sought by items C, D and E was already in the possession of IUE Local Union officials at the time of the Union's request. No such justification was ever advanced to the Union, however, and the [25] record as it stands does not substantially support the factual predicate for that contention—a contention which was not raised or litigated at the hearing and is mentioned as an apparent afterthought for the first time in the Company's brief.[94]

[30] I conclude and find that the record substantially supports the allegations of paragraphs 12(f) and (g) of the complaint, and that the Respondent's conduct therein alleged, considered in the light of the entire record in this case, was violative of Section 8(a)(5) and (1) of the Act.

[35] 3. Local bargaining

The relevant facts relating to local bargaining—to the extent found established by the record—have been set out in detail in section P, above. They are to be considered along with the findings relating to IUE's [40] status as national bargaining representative made in section B, above.

80

As found above, the Respondent on September 30, 1960, by direct communication to its Schenectady employees of-

[50] [94] To support that contention, the Company has directed attention in its brief to an article in the 1955-1960 agreement requiring the Company to supply Local IUE officials with information concerning layoffs and recalls. There is, however, no record evidence to show whether such information was in fact furnished and, if so, whether it was furnished [55] in such written or other durable form as to have been available to the Union when it made its request. If the Company actually believed at the time that the information was already available to the Union through its locals, and was guided accordingly, I think it highly unlikely that the Company would have refrained from expressly mentioning this to the [60] Union as a reason for noncompliance.

fered to keep in effect at that plant beyond October 1, provided the employees there did not strike, all terms of the old contract (except the escalator clause), including [5] union-related and grievance-related conditions. Shortly thereafter, the Respondent's representative at that plant made or offered to make a separate agreement to that effect with the Schenectady Local's business agent, confirmed in writing on October 4. Respondent offered the same separate agreement that day to the Pittsfield Local and broadly [10] publicized it to Pittsfield employees. The strike-truce conditions offered the Schenectady and Pittsfield Locals were more favorable than those theretofore offered the IUE in national negotiations. It was not until after a charge was filed, based in part on the offer made to the Schenectady Local, that the Respondent made the same offer to the IUE [15] negotiating committee. Notwithstanding the Union's rejection of the offer, the Respondent thereafter proceeded to make it on a separate local-by-local basis at various locations, including Lynn, Waterford, Louisville, and Bridgeville, through direct contact with local officials, combined with appeals to employees urging them to induce local acceptance. At Syracuse, [20] the Respondent solicited the Local, through its president, to abandon the strike locally and to return employees to work on the basis of the nationally rejected truce proposal which Schenectady had since accepted. The Syracuse solicitation was accompanied by a promise of benefit to the Local president and possibly also to some 16 other suspended strikers.

[25] The General Counsel contends in substance that the Respondent, in derogation of the Union's status as national bargaining agent and in order to undermine the Union's

authority as such bargaining agent, sought by the aforesaid conduct to bypass the Union and to deal directly with Locals [30] and/or employees with respect to terms and conditions of employment and other matters properly subject to national negotiations.[95] The General Counsel takes the position that the Respondent's conduct now specifically under scrutiny must, when considered in the context of the entire record, be viewed not only as evidence of the Respondent's overall [35] bad faith, but also as independently violative of Section 8(a)(5) and (1). On all the relevant evidence, I am persuaded that the General Counsel's position is substantially supported.

The law is of course well settled that it is the duty of an [40] employer to bargain exclusively with the chosen representative of his employees, an obligation which "exacts the negative duty to treat with no other." *Medo Photo S. Corp. v. N. L. R. B.*, 321 U. S. 678. It has frequently been held violative of 8(a)(5) and (1) of the Act for an employer to attempt to bypass a designated bargaining agent by dealing directly with [45] employees, individually or as a group, or, for that matter, similar to the situation here, with a representative of a segment of a bargaining unit, such as for example, with a local where an international union is the bargaining agent for a broader group. See, *e.g.*, *Eastern Massachusetts Street Railway*, 110 NLRB 1963; *John L. Clemney Co., Inc.*, 118 NLRB 599;

---

[50] [95] As supporting evidence of the Respondent's purpose to undermine, the General Counsel points particularly to the Respondent's contemporaneous efforts through its massive communications program to impair the [55] prestige, authority and effectiveness of the Union as bargaining agent, by seeking to discredit the IUE top officials in the eyes of the employees and to induce and encourage employees not to follow the leadership of the IUE national negotiators with respect to bargaining and strike decisions, all as reflected by factual findings made above.

Quaker State Oil Refinery Co., 121 NLRB 334, 338, 367, 368, enfd. 270 F. 2d 40, 45-46, cert. denied 361 U. S. 917; *Wooster Division of Borg-Warner*, 113 NLRB 1288, 1296, 1328, enfd. insofar as material, 236 F. 2d 898 (C. A. 6); *Guistina Bros. Lumber Co.*, 116 NLRB 700, 727.

[5] The Respondent would distinguish the situation here as to some of the incidents complained of on the ground that they occurred at locations where IUE locals rather than the IUE itself had been certified by the Board as the bargaining representatives. That was so at Schenectady, [10] Pittsfield, Lynn, and Syracuse, but not at Louisville, Waterford and Bridgeville, where the IUE itself was certified.[96] As related to the Locals separately certified, the Respondent contends that the General Counsel's allegations of unlawful direct dealing must be found fatally defective as a matter of law on the theory, so stated by it, that "it is perfectly [15] appropriate for an employer to deal with a certified bargaining representative *at any time.*"

In the particular circumstances of this case, I am unable to agree. It has already been found (see section B, above) that as a result [20] of the historical pattern of bargaining followed by the IUE and GE, and concurred in as well by the IUE locals involved, the parties have established a workable relationship under which the IUE, through its GE Conference Board, is considered with respect to the negotiation of national agreements and matters related thereto the sole bargaining agent—so recognized and [25] acknowledged by GE—for all employees in the aggregate

[55] [96] As found above, the IUE at plants where it is directly certified has Local Unions which represent employees at local levels in substantially the same manner as do the IUE locals which are directly certified.

of IUE units represented on the Conference Board.[97] The relationship so established is analogous in kind to that which exists between an employers' association authorized to bargain on behalf of a multiemployer group and a single union which has historically bargained with the association on the basis of the [30] multiemployer unit. In fact, the situation here presents a stronger case for indivisible bargaining; for unlike employers whose bonds are artificial and who are free at appropriate periods to withdraw at will, the Locals are all bound together and to their parent by virtue of their common affiliation and the Union's constitutional provisions imposing joint bargaining on them [35] in circumstances like those in the instant case. The same underlying principles that make it improper in a multiemployer situation for a union to attempt through direct dealing with individual employer members to fragmentize the multiemployer group apply with equal strength to the converse situation that is here presented. Where, as here, a party to [40] negotiations has consented in advance thereof to recognize and deal with a common bargaining agent authorized to act for and bind all members of a multiple group on a joint basis, and has entered into negotiations with the group bargaining agent on that basis, fair dealing requires that party, at least while negotiations are still in progress, to honor fully the [45] recognition that has been accorded and to comply exactly with the form of single dealing that has been undertaken. Separate or attempted separate dealing during such negotiations with a member or fraction of the multiple group undercuts the authority to deal for all that has been delegated to the recognized bargaining agent, denies that agent the full

[60] [97] *Cf., Radio Corporation of America*, 135 NLRB No. 100.

measure of [50] recognition that is its due, tends to subvert the agreed upon mode of bargaining, and is wholly repugnant to basic standards of good faith. To hold in the particular circumstances of this case that the Respondent was justified simply because of the Local's separate certifications in ignoring the Locals' delegation of bargaining authority to the IUE and in

disregarding the historical and agreed upon method of bargaining, would be to fly in the teeth of the foregoing principles, exalting form over substance.[98]

[5] What has just been said is not to be read as impliedly holding that the Respondent, having once consented to and participated in multiunit bargaining with the IUE, is foreclosed forever from withdrawing from that arrangement without the Union's consent. That question is not now before the Board and is not here decided. It is held, however, that [10] at the very least the principles enunciated in *Retail Associates, Inc.*, 120 NLRB 388, 390, are applicable. In other words, assuming the Respondent's freedom to withdraw, the Respondent was required to declare an unequivocal election to do so at an appropriate time. It could not, however, in good conscience and good faith deal with the Union as [15] bargaining agent and at the same time seek to undercut the Union's authority as such agent.

[98] *Cheney California Lumber Co.*, 130 NLRB 235, upon which the Respondent principally relies, is not authority to the contrary. In *Cheney*, the [55] Board particularly stressed that the employer, for whose employees the respondent union in that case had theretofore been separately certified, had designated the employer association to act as bargaining agent "for the purpose of recommendation only" and had "retained full freedom to accept or reject recommendations that might be made by [60] [the Association]." Other cases cited by the Respondent have been considered and are found wholly inapposite.

Here the Respondent participated in multiunit negotiations with the Union as the recognized representative alone authorized to engage in national negotiations, not only before and after, but at the very time it was seeking to deal separately with Locals on strike-truce arrangements. [20] Under the circumstances, the Company is now estopped from asserting that it was also entitled to bargain on a separate local-by-local basis. See *Detroit Window Cleaners Local 139*, 126 NLRB 63; *cf. Eastern Massachusetts Street Railway, supra.*

[25] It is quite clear that the subject of strike-truce conditions fell within the compass of the Union's delegated and recognized authority as national bargaining agent under the historical pattern of bargaining as developed by the parties. The strike grew out of national negotiations. Whether or not there was to be a truce and, if so, the terms and conditions [30] of employment that were to apply in that event, were, therefore, subjects to be dealt with in national negotiations. It was the Respondent's clear duty to bargain on that subject exclusively with the IUE and not to attempt to bypass it through separate dealings with Locals on whose behalf the IUE was then acting as bargaining agent.

[35] As found, the truce condition offered the Schenectady and Pittsfield Locals were more favorable than those theretofore offered the IUE. Apart from the legal defense already considered and rejected, the Respondent in its brief claims it was justified in bypassing the IUE at those locations [40] for a variety of other stated reasons. They are found insufficient. The Respondent stresses that at the

September 29 meeting it had not *refused* union-related conditions but had simply declared that it would have to "consider" later whether and under what conditions it might retain them in effect after the contract's expiration date. The Schenectady Local's [45] original decision not to participate in the strike, says the Respondent, compelled it to decide with regard to that location the question it had told the national negotiators it would have to "consider." But this neither explains nor excuses the Respondent's failure to communicate its decision first to the national negotiators. It is undisputed that the [50] decision to keep in effect at Schenectady *all* contract conditions except

for escalation, so long as Schenectady remained at work, was made on September 29. That was the very day the Respondent had reiterated that it would regard its contractual commitments as having come to an end on October 1, and had declined in response to the mediators' strike-truce [5] proposal to commit itself to do more than maintain in effect the then current pay and fringe benefits, adding only that it would have to "consider" what to do about union-related conditions. It is noted that two bargaining meetings were held between September 29 and the start of the strike, at which the Respondent could have communicated to the Union [10] its decision on the reserved question and at least have given the Union an opportunity to consider it. Yet it chose to remain silent at the national negotiations while speaking out at Schenectady, thereby revealing a deliberate purpose to bypass the Union and to offer Schenectady a special incentive to en-

courage its nonsupport of the Union's strike decision.[39] [15] certainly, the excuse offered as to Schenectady could have no application to Pittsfield where the Local, although previously voting not to strike, had joined the strike at its inception. The offer there, which, as the record shows, was authorized by GE headquarters during the strike, could have had as its only purpose the proffer of a special inducement to the [20] Local to abandon the strike. By way of further excuse for its failure to communicate to the Union the strike-truce conditions it offered directly to the Locals, the Respondent points to the fact that a chain-wide strike had in the meantime intervened and asserts that it had reason to believe the Union would reject any contract extension offer that did not include [25] the escalator clause. But the intervention of the strike did not reduce the Respondent's bargaining obligations to the Union. And the assertion of anticipatory rejection serves only to highlight the Respondent's aim to undermine the Union's agency authority.

[30] The alleged offers of separate strike-truce terms on a local-by-local basis at Lynn, Waterford, Louisville and Bridgeville differ from the Schenectady and Pittsfield situations in that they were made *after* the same offer had already been presented to and rejected by the IUE Negotiating Committee. The Respondent contends that as a consequence of [35] the IUE's rejection it was entirely lawful for it to reiterate to Local officials the terms and

[39] The Respondent's calculated purpose to undercut the authority of the Union as national bargaining agent is further reflected by the alacrity [60] with which ERM Stevens responded to Jandreau's message to Schenectady Local members, relating to the absence of contractual protections, with a written commitment to continue in effect the provisions of the old contract as long as the Local was not on strike.

conditions which it had already told the IUE it was prepared to reestablish at any IUE unit not on strike. Its conduct, argues the Respondent, must at worst be viewed as standing on the same legal footing as that of an employer who, absent threats or promises, [40] solicits strikers to return to work upon terms and conditions previously offered their union.

Though the Respondent's position appears at first blush to have plausibility, it does not withstand the test of closer analysis. To begin [45] with, I am unable to agree that the Respondent in contacting Local officials was simply interested in *reporting* the offer it had made at the national level. At Lynn, the Respondent expressly proposed the *negotiation* of a separate memorandum of intent. The Respondent's letter there made no reference at all to the Respondent's proposal in national negotiations. [50] At Waterford, Louisville and Bridgeville, to be sure, no separate *written* agreement was proposed. But when the content of the letters and the obviously pointed purpose in directing the letters to top Local officials is considered along with the explanations therefor in contemporaneous employee communications, there can be little doubt that the Respondent was inviting, [55] if not indeed affirmatively proposing, separate Local strike-truce arrangements.

84

As for the Respondent's suggested legal analogy, it cannot be doubted of course that an employer has a lawful right after good faith bargaining to an impasse to put into effect unilaterally new terms and conditions he has already offered a union and to solicit strikers to [5] return to

work on that basis. But that is not the situation here, even if it be assumed both that the Respondent had otherwise met the standards of good faith bargaining and that a legally sufficient impasse situation might be found to exist separately on the strike-truce issue while negotiations were still proceeding without an impasse on other bargaining [10] issues.[100] Here the Respondent had not already put into effect the contract conditions referred to in its proposal. As matters then stood GE was operating its struck plants under terms and conditions of employment that provided only for the continuation of current pay and fringe benefits for employees working during the strike or for strikers returning to work [15] as individuals. Under the Respondent's proposal, the reestablishment at any IUE unit of other contract conditions, such as the union-related and grievance-related conditions, was contingent, not only upon the return of strikers to work, but on official Local Union action, supported by public announcement to that effect by Local Union officials, calling the [20] strike to a halt. In other words, the Respondent's strike-truce proposal as directed to individual Locals called in substance for *separate Local Union acceptance,* without regard to IUE national acceptance, of the Respondent's strike-truce proposal as the *quid pro quo* for reestablishment. For reasons earlier indicated, this quite clearly was an attempt by the Respondent to [25] bypass the Union by dealing directly with a segment of the group represented by the Union, tantamount to dealing directly with employees. As such, it was in clear derogation of the Union's status and authority as the national bargaining agent. See, *Guistina*

[100] *Cf. Herman Sausage Co.*, 122 NLRB 168, 171-2, enfd. 275 F. 2d 299 (C. A. 5).

Bros. Lumber Co., 116 NLRB 700, 727; *The Stanley Works*, 108 NLRB 734, 735-736.

[30] Apart from being in derogation of the Union's agency status, the Respondent's conduct now under consideration constituted, it is found, unlawful solicitations to induce employee abandonment of the strike.[101] This was clearly so at Syracuse, Schenectady and Pittsfield where the [35] Respondent held out an offer of special benefits in return—at Syracuse in the form of a promise to lift the suspension of the Local's president and perhaps others, and at Schenectady and Pittsfield in the form of proffered reinstatement of contract conditions then not available to other locals. At Lynn, Waterford, Louisville and Pittsfield, the benefits offered [40] were by then already available to all other locals. But there, no less than at Schenectady and Pittsfield, the solicitations were of a kind reasonably calculated to undermine the authority of the Union —and this for reasons earlier indicated. That such was the Respondent's actual purpose is fairly to be inferred, moreover, from the surrounding circumstances. Particular [45] reference is made to the Respondent's contemporaneous efforts through its communications program to discredit the motives of the IUE's top leadership and to induce and encourage employee nonsupport of the Union's bargaining and strike decisions.

[50] On all the evidence, I conclude and find that the Respondent's aforesaid attempts while engaged in national

[101] See, *e.g.*, *The Texas Company*, 93 NLRB 1358; *West Coast Luggage Co.*, [60] 105 NLRB 414, 420; *Wooster Division of Borg-Warner Corp.*, 113 NLRB 1288, 1296, 1328, enfd. insofar as material, 236 F. 2d 898; *Guistina Bros. Lumber Co., supra; Federal Dairy Co., Inc.*, 130 NLRB 1158, 1170, 1172.

negotiations with the Union to deal separately with Locals on matters properly the subject of national negotiations and its solicitations of Locals separately to abandon or refrain from supporting the strike—when considered in the context of all the [55] circumstances of this case—constituted conduct violative of Section 8(a)(5) and (1).

85

V. *Analysis and concluding findings as to the alleged overall bad-faith bargaining*

(1)

[5] I here consider the broad allegation of the complaint that the Respondent at all times since June 13, 1960, negotiated with the Union in bad faith. This allegation places in issue the Respondent's overall course of conduct, both at and away from the conference room, as it bears [10] on the Respondent's bargaining frame of mind during the entire period of negotiations. Included within the framework of that issue are the specific allegations of the complaint adverted to in section A, above, among them the alleged independent violations that have already been considered and ruled upon.

[15] In considering this issue, we are faced with the threshold question as to the applicable principles that must govern decision. The Respondent places principal reliance upon the caveat in Section 8(d) that the bargaining obligation "does not compel either party to agree to a proposal or require [20] the making of a concession." The Respondent would have the Board read 8(d)—in a situation where, as here, an employer has met and conferred with a union and has not insisted upon the inclusion of unlawful or nonmandatory contractual provisions—as allowing a finding of bad-faith bargaining *only* where it is

established that the employer negotiated with a desire *not* to [25] reach an agreement. The state of mind with which an employer negotiates, argues the Respondent, is material solely to the narrow issue of whether the employer was genuinely desirous of entering into an agreement with the union, though only on his own terms, or was desirous instead of evading agreement altogether. But, says the Respondent, once it has been established, [30] as it has been in this case, that the employer was willing to enter into a collective-bargaining agreement, no issue of good faith remains, and the Board has no more business to intrude itself into the manner in which negotiations were conducted or the methods or techniques used by the employer to achieve his bargaining objectives than it has to intermeddle with the [35] substantive terms of the bargain.

The narrow standard urged by the Respondent undoubtedly provides one test for assessing the presence or absence of bargaining good faith. But it can by no means be regarded as an exclusive one. It is obviously [40] at odds with the numerous cases in which an employer's willingness to enter into a collective-bargaining contract on his own terms, or even his actual execution of one, was insufficient to preclude a conclusion of bad-faith bargaining.[102] It is also at variance with Congress' primary purpose in enacting Section 8(b)(3), the counterpart of 8(a)(5). As was pointed out in [45] *N. L. R. B. v. Insurance Agents*, 361 U. S. 477, 487, Section 8(b)(3) was primarily intended

[50] [102] See, *e.g.*, *Southern Saddlery Company*, 90 NLRB 1205, 1207-8, and cases cited therein; *N. L. R. B. v. Truitt Mfg. Co.*, 351 U. S. 149; *N. L. R. B. v.* [55] *Sharon Hats*, 289 F. 2d 628 (C. A. 5) enfg. 127 NLRB 947; *"M" System, Inc.*, 129 NLRB 527; *Clinton Foods*, 112 NLRB 239, 261; *Phelps Dodge*, 101 NLRB 360; *Andrew Jergens Company*, 76 NLRB 363.

"to prevent employee representatives from putting forth the same take it or leave it attitude that had been condemned in management." The bargaining objective of a union is almost always to obtain an agreement, and the take-it-or-leave-it bargaining attitude at which 8(b)(3) is largely

86

aimed presumes willingness to enter into an agreement.[103] It is of course clear that the duty to bargain imposed on unions was intended to be the same as that imposed on employers.

[5] Section 8(d) lays down no rigid yardsticks for the measurement of good faith, and understandably so, for "good faith" is an elastic concept that can have "meaning only in its application to the particular facts of a particular case." *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 410. Certain broad principles of general application have [10] become well established, however. The statutory injunction to "confer in good faith," as is obvious from its own terms, calls for more than ritualistic performance, even where a collective-bargaining relationship is not sought to be avoided.[104] Good faith, to be sure, does not require the yielding of positions fairly maintained. And no inference of bad faith [15] may be drawn

[103] The proponents of Section 8(b)(3) made it clear that their target was the elimination of take-it-or-leave-it bargaining occurring in meetings [40] and conferences as well as in attempts to impose agreements on employers without formal meetings and conferences. Senator Ellender, 2 Leg. Hist. 1062, 1244; Senator Knowland, 2 leg. Hist. 1172; Senator Morse, 2 Leg. Hist. 982; Senator Taft, 2 Leg. Hist. 1012.

[104] As stated in the *Insurance Agents* case, *supra*, at p. 485, "Collective [45] bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of take-it-or-leave-it. It presupposes a desire to reach ultimate agreement . . . ."

solely from a party's failure to retreat from originally declared positions. (*Bethlehem Steel Co.—Shipbuilding Division,* 133 NLRB 1347).[105] However, intransigence coupled with other evidence may under certain circumstances support a finding of an uncompromising attitude indicative of bad faith (*N. L. R. B. v. Fitzgerald Mills Corp., supra*) The [20] 8(d) caveat on which the Respondent relies was not designed as a shield to protect "surface bargaining."[106] Good faith requires parties to negotiation not only to have a sincere desire to reach agreement, but also to make an earnest effort to reach common ground through the processes of collective bargaining.[107] The latter requirement does not mean that [25] an employer (or union) must yield its freedom to reject proposals or to refrain from making concessions unacceptable to him. But it does mean, *inter alia,* that the negotiating parties must approach bargaining with a mind accessible to persuasion; that they must follow procedures increasing the prospects of a negotiated agreement; that they must regard all proper [30] issues before them as issues to be resolved through the processes and procedures of collective bargaining; that they must be willing "to discuss freely and fully their respective claims and demands, and, when these are opposed to justify them on reason";[108] and

[105] By the same token, the fact that a party has made "concessions here and [50] there" does not alone conclusively establish his good faith. *N. L. R. B. v. Herman Sausage Co.,* 275 F. 2d 229, 231-232; *N. L. R. B. v. Fitzgerald Mills Corporation* (C. A. 2), 51 LRRM 2174.

[106] *N. L. R. B. v. Herman Sausage Co., supra.*

[107] *Cox, Good Faith Bargaining,* 71 Harvard Law Review 1401, 1416-1418. [55] See, too, Section 204(a)(1) of the Act which requires employers and unions to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions." In *N. L. R. B. v. Truitt Mfg. Co.,* 351 U. S. 149, 152, the court equated the 204(a)(1) duty with the duty under Section 8(a)(5) and 8(d).

[60] [108] *N. L. R. B. v. George P. Pilling & Sons,* 119 F. 2d 32, 37 (C .A. 3),

that they must be willing at least to consider and explore with an open mind compromise proposals or [35] other possible solutions of their differences in an effort to find a mutually satisfactory basis for agreement.[109]

87

"[The] duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union."[110] Performance of that duty therefore also contemplates full acceptance by management of the representative status of the Union, not as a bare advisor, but as a joint [5] participant in the establishment of wages, hours and working conditions. Conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the status, authority or prestige of the union while negotiations are in progress evidences the absence of a good faith effort to compose differences and to reach [10] agreement in the manner the Act commands.[111] The same is true of conduct which "minimizes the influence of organized bargaining" and emphasizes to employees "that there is no necessity for a collective bargaining agent."[112]

[15] Compliance with the bargaining obligation also requires—as was most recently stated by the Supreme Court

---

[109] *N. L. R. B. v. Insurance Agents Union, supra*, at pp. 485-488; *Globe Cotton Mills v. N. L. R. B.*, 103 F. 2d 91, 94. See, also, *Cox, supra*, note at pp. 1411, 1418. *Cox and Dunlop*, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 422.

[110] *Insurance Agents* case, *supra*, at pp. 484-5.

[60] [111] *"M" System, Inc.*, 129 NLRB 527, 547; *N. L. R. B. v. Fitzgerald Mills, supra.*

[112] *May Department Stores v. N. L. R. B.*, 326 U. S. 376.

in *N. L. R. B. v. Katz*, 369 U. S. 736, 747—that the negotiating parties refrain from

> behavior which is in effect a refusal to bargain, or *which* [20] *directly obstructs or inhibits the actual process of discussion*, or which reflects a cast of mind against reaching agreement (Emphasis supplied).

Good faith, or the want of it, is concerned essentially with the [25] state of mind with which the party charged with a refusal to bargain has entered into and participated in the bargaining process. In determining whether a party has bargained in bad faith, the Board is not confined to a consideration of what was said or done in the conference room, but may also take into account other related conduct. Determination of that issue

> [30] normally can rest only on an inference based upon more or less persuasive manifestations of [that] state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course [35] of negotiations constitute the raw facts for reaching such a determination. *N. L. R. B. v. Truitt Mfg. Co.*, *supra*, at p. 155.

All aspects of the Respondent's bargaining and related conduct must be considered, not as separate fragments, each to be assessed in isolation, but [40] in unity. As stated by Mr. Justice Frankfurter, in his separate opinion in the *Insurance Agents* case, *supra*, pp. 505-506,

> Activities in isolation may be wholly innocent, lawful and "protected" by the Act, but that ought not to bar the Board [45] from finding, if the record justifies it, that the isolated parts "are bound together as part of a single plan [to frustrate agreement]. The plan may

make the parts unlawful." *Swift & Co.*, 196 U. S. 375, 396.

[50] Applying to this case the principles set forth above, I am satisfied that the General Counsel has sustained the allegation of overall bad-faith bargaining. I reach that conclusion on the basis of the totality of the Respondent's conduct, both at and away from the bargaining table, taking particularly into account the cumulative force of considerations to be [55] pointed up below, but only after weighing all other relevant circumstances in this case, those favorable to the Respondent as well as those opposed.

88

(2)

The complaint, as amended, alleges that the Respondent bargained in bad faith on and after June 13, 1960. The date stated is the date the [5] Union presented its offer at an informal meeting. Formal contract negotiations, however, did not actually begin until July 19, 1960. Apart from the employee communications criticizing the offer—a subject to be dealt with later—the only matter of consequence that occurred in the interim related to the personal accident insurance matter, the facts of [10] which are reported in section D, above. As appears from the findings there made, the personal accident insurance matter is outside the mainstream of this case since it was not *directly* involved in the subsequent contract negotiations. However, it was specifically referred to by the General Counsel in his bill of particulars as an item on which he relied to

support his [15] broad bad-faith bargaining allegation.[113] Although the General Counsel stated at the hearing that he was not contending that it was a "*per se* violation," the issue relating to it was fully litigated and briefed by all parties as a distinct element in the case.[114] On the basis of the facts developed, it is quite clear—and, indeed the Respondent does not dispute— [20] that the proposed additional accident insurance, though to be paid for entirely by the employees, involved a bargainable subject, no less than contributory insurance. *Phelps Dodge Copper Products Corp.*, 101 NLRB 360; *General Motors Corp.*, 81 NLRB 779, enfd. 179 F. 2d 221 (C. A. 2). On the strength of the Board's decision in *Equitable Life Insurance Co.*, 133 NLRB [25] 1675, 1688-1694, which is clearly controlling, I find that the Respondent's presentation of its personal accident insurance proposal to the Union on a conceded take-it-or-leave-it basis constituted a rejection of the principle of collective bargaining, violative of Section 8(a)(5) of the Act, thereby reflecting adversely on the Respondent's general attitude toward collective [30] bargaining.[115]

---

[45] [113] The bill alleged: "Commencing on or about June 13, 1960, Respondent refused to negotiate in good faith with the Union concerning Respondent's offer to make Personal Accident Insurance available to Union represented employees."

[50] [114] A finding of a separate violation based thereon was requested by the Union in its brief and at oral argument.

[115] I find no merit to the Respondent's defense that its conduct was justified because under an express waiver provision in the 1955 Pension and Insurance Agreement neither party could require the other [55] during the life of the agreement to bargain with respect to insurance and pension matters. Substantially the same defense was raised and rejected in *Equitable*—though there based on the statutory 8(d) provision to like effect. Nor do I find it a valid basis for distinction, as urged by the Respondent, that *Equitable* involved [60] wages, whereas the instant situation involved a "relatively insignificant [item] in terms of the total wage and benefit program in effect." The obligation to bargain on mandatory subjects does not turn on the value of the item to be bargained about.

(3)

The Respondent's negotiating frame of mind during the negotiations [35] which formally began on July 13 must be assessed against the backdrop of its bargaining philosophy, outlined in section C(1), above. Analysis of the record shows that the Respondent substantially adhered to that philosophy during its 1960 contract negotiations with the IUE.

[40] Some 6 weeks of meetings (18 sessions) preceded the presentation of the Respondent's offer. During that time the Union was afforded an opportunity formally to present and argue its contract demands. It is quite clear, however, that the Respondent regarded the pre-offer meetings primarily

as "listening" sessions, forming but one element of the "research" in which it engages before making its unilateral determination of "everything it believes to be right" for incorporation in its "fair, firm offer."

[5] There can be little doubt of the Respondent's bargaining bad faith during at least the 4 weeks (12 sessions) of early negotiations devoted to employment security matters. As found in section F(1), above, the parties had agreed that the early meetings would be *negotiating* and not simply review meetings, and that an effort would be made to reach [10] agreement on employment security subjects before the negotiations turned to other subjects beginning August 16, 1960. Nevertheless, as the findings in section G, above, show, the Respondent entered into and partici-

pated in the early meeting without any intent to attempt to reach agreement on employment security. Long before the early negotiations, the Respondent [15] in its communications program to employees had in effect committed itself to reject the Union's employment security proposals and at the meetings simply reiterated, albeit with greater detail, positions already publicly taken. In some instances, the Respondent also gave reasons for rejection shown by later developments not to have been its true reasons. During the [20] 4 weeks of early negotiations, the Respondent gave no indication whatever to the Union of the employment security program it was eventually to include in its offer to the IUE and other unions. The Union was thus denied an opportunity to consider, comment on, or propose compromise or other alternatives to the Respondent's employment security program during the [25] sessions that had been specifically set aside for the negotiation of employment security items, and prior to the time the Respondent's position was bound to become hardened by virtue of its "fair, firm offer" and uniformity policies.

[30] During the 2 weeks devoted to the presentation of the Union's general demands, other than employment security, the Respondent continued to take the position that it was primarily interested in "fact finding," thus following the script of its approach to collective bargaining as set out in section C(1), above. Though the Respondent discussed with the Union [35] the latter's specific demands and in many instances expressed positions on such demands, where its position was one of rejection, it declined to declare any affirmative views on the key subjects of wage increases, pensions, insurance and other economic benefits, except to make clear that it intended to eliminate the

escalator clause. Standing alone, no inference of bad faith [40] may be drawn from the Respondent's failure to declare itself affirmatively at this time. Whether an employer declares his affirmative thinking on each item of a union's proposal before passing on to the next, or elects instead to hear out the union on all its demands before making any counter-proposals, is normally a matter of bargaining technique that lies outside the [45] scrutiny of the Board. Listening to a union's demands is part of the process of collective bargaining, though not the fulfillment thereof. In this case, as in others, however, the Respondent's conduct must be examined in the light of whether it was prepared in truth, not merely in form, to complete the process of bargaining later. To suggest, as the Respondent's [50] declared bargaining approach appears to do, that an employer need only listen to a union's demands and supporting arguments as part of a broader research program, frame an offer on the basis of his own overall research, and then consider only such *new* information as might reveal a factual error in the offer, is to place a union in the role of an advisor rather than a [55] participant in the determination of employment terms through the process of collective bargaining; it is to deny the Union the status to which the Act entitles it. At any rate, the fact remains that until the Respondent gave specific indication of its own line of thinking on key issues, there could be no full or meaningful bargaining, for, without issue joined, discussions [60] could take place only in a vacuum, precluding any possibility of give-and-take that might be necessary to forge agreement.

Thus, if any genuine bargaining were to occur, it had to begin at the time the Respondent's offer was made.

(4)

[5] When the Respondent formally presented its offer on August 30, it was responsive to the Union's demands only in small part. It contained features relating to benefits, employment security and even contract language that were entirely different from those had been requested [10] by the Union. During the earlier negotiations there had been neither mention nor discussion of them as contemplated alternatives to the Union's proposals. The Respondent explained to the Union, as it did later to the employees, that it had made its offer responsive to "employee desires" as determined by its own extensive research and surveys. The Respondent thus [15] made it plain that it assigned the Union a subordinate or at most only a contributing role as the spokesman for employees.

The Union declared the same day that the offer was unacceptable, and that the proposals of both parties should form the basis of collective [20] bargaining. It requested that negotiations continue for 3 days without the pressures and glare of publicity. The Respondent, however, rejected the Union's request, giving as its reason that employees should know at once what was on the table. And the following morning, it proceeded to publicize its offer, release it to other unions, and present it directly [25] to employees at plant meetings as well as through employee communication channels, disregarding the Union's vigorous objection that to do so would prematurely "freeze" its position and thereby interfere with good-faith negotiations.

[30] In the particular circumstances of this case, I find that the Respondent's haste to publicize its offer reflected the want of an earnest effort on its part to seek through the processes of collective bargaining a possible basis for mutual agreement, and constituted clear evidence of bad faith.

[35] The Union's objection that publication would operate to "freeze" the Respondent's position was well-founded. The Respondent's action must be considered, not in the abstract, but in the context of its "fair firm offer" approach to bargaining and its uniformity policy, as outlined in [40] section C(1), above.[116] The Respondent's "fair, firm offer" approach, although assertedly leaving room for the correction of factual error disclosed by additional information from any source or a subsequent significant economic change, rejects in effect concessions, trading or compromise as a means of finding common ground. In the light of the [45] Respondent's widely advertised bargaining philosophy, the publication of the offer was a clear indication that the Respondent as a matter of policy would not thereafter consider with an open mind proposed concessions, compromises or other suggested solutions of differences between the parties aimed at achieving through the give-and-take of collective bargaining an [50] accommodation of conflicting positions.[117]

---

[116] The Respondent's intention to follow in 1960 the "Boulware" approach to bargaining is reflected by Vice President Parker's comments to plant managers and other members of GE supervision in early 1960, as reported [55] in section C(2), above. It will be recalled that Parker described that approach as follows:

> The Boulware approach to this has been that we would go forward and do the things we felt appropriate. We would then offer these to the Union, and if they saw fit to accept [60] them, why God bless them, but if they didn't, well they could do something else.

[117] *Cf. California Girl, Inc.*, 129 NLRB 209, 212. "While the Act does not require that either party yield to the other's proposals, there must be at least a capacity and potentiality for yielding . . ."

The Respondent's publication of its offer and simultaneous presentation to other unions also brought into play a further constricting factor—the Respondent's uniformity policy, to which the Respondent was likewise committed. That policy, had it stood alone, would not of course [5] preclude the Respondent from adding to its offer to the Union and then making the additions available to other unions and nonrepresented employees. But it does not stand alone, and taken in conjunction with the "fair, firm offer" policy does have such a preclusive effect. Even were that not so, the uniformity policy nevertheless had the operative effect—once the [10] Respondent's basic offer was published—of obstructing openminded consideration by the Respondent of modifications in or alternatives to its basic offer that might be proposed by the Union but not be desired by other labor organizations with which the Respondent dealt. This was especially true in the areas relating to companywide benefit plans, such as pensions and [15] insurance and income extension aid, where the Respondent considered complete uniformity important or, as in the case of pension benefits at least, absolutely essential. This is not to condemn the Respondent's desire for uniformity as such, nor is it to suggest that the Respondent was dutybound to complete its negotiations with the Union before presenting its offer to [20] other unions. The point I make is that, as a minimum, good-faith bargaining required the Respondent, before chaining itself to its uniformity policy, to give the Union an adequate opportunity to present and argue its demands and priority desires, not in a vacuum, but in the light of the Respondent's disclosed affirmative positions, and in that context to explore with the [25] Union possible alternative courses or

compromise solutions that might lead to a mutually satisfactory accord.

That does not mean of course that the Respondent had to submit to endless discussions before finalizing its offer. It is quite clear, [30] however, considering the magnitude of the negotiations here involved, that 1 day was far too little and 3 days certainly not too much. The situation here might have been different had the Respondent disclosed to the Union during the earlier negotiations—before it announced its offer—the affirmative proposals it had under consideration and had then provided an [35] adequate opportunity for discussion, exploration, and consideration of alternative courses or solutions that might bring the parties together. But this it did not do.[118] It chose instead to disclose its affirmative positions for the first time in its "fair, firm offer"—an offer which in most basic respects was unresponsive to the Union's demands, substituting [40] for some of them different approaches never theretofore explored in the negotiations—and to bind its offer after only 1 day's discussion to policies inhibiting and obstructing its bona fide consideration thereafter of conflicting union positions on contract issues. The course the Respondent chose amounted in effect to a unilateral determination of employment terms, [45] leaving negotiations thereafter—unless it deviated from its own policies—an empty exercise with predetermined results.[119]

---

[118] In the respect stated, among others, this case is clearly distinguishable from *The Philip Carey Manufacturing Company* case, 140 NLRB No. 90, [50] recently decided by the Board.

[119] It may well be that any other course would have confronted the Respondent with practical procedural difficulties in achieving its aim for substantial

(Footnote continued on following page)

(5)

The course taken by the Respondent in the negotiations is not alone enough to establish, but neither is it such as to rebut, if found established by other circumstances, an inference that the Respondent negotiated with a fixed predetermination not to deviate materially from its bargaining policies. During the approximately 25 meetings that took place between August 30, when the Respondent presented its offer, and October 19, when the Respondent declared an impasse, the Respondent made [10] only two changes in its offer that it considered of sufficient consequence to mention in its employee communications. One was the "early signing bonus" change, not requested by the Union, which was announced just before the IUE convention recess and was thereafter capitalized upon in the Respondent's communication program aimed at weakening employee support of the Union. [15] The other was the holiday-vacation option which was offered in the face of the Union's theretofore declared opposition thereto and was represented to employees as being a voluntary rearrangement of its offer in response to employee desires. Far from showing good faith, or a departure from the Respondent's declared bargaining policies, the circumstances surrounding [20] the original offer of the holiday-vacation option—set out in

---

(Footnote continued from preceding page)

contract uniformity in its multiple union relationships. That aim, however, while entirely legitimate in itself, cannot be [55] elevated to a principle excusing noncompliance with good-faith bargaining procedures. Just because the Respondent might find it procedurally inconvenient or impracticable to realize its uniformity goal by engaging in full bargaining with *all* unions before freezing its offer is no justification for its failure to bargain with any one union—and [60] particularly the IUE, by far the largest union in its chain. *Inland Steel Co.*, 77 NLRB 1, 11, 32, enfd. 170 F. 2d 247 (C. A. 7), cert. den. 336 U. S. 960. Effectuation of the Respondent's private policies cannot be made paramount to the Act's command.

section L, above—evidence, it is found, precisely the opposite. Of the remaining three changes made during the period stated, two—providing for the furnishing of actuarial information relating to the pension and insurance plans—did no more than confirm an already existing practice. Moreover, [25] they involved noneconomic changes outside the Respondent's basic offer. The third—the Exclusion K change, of uncertain date—[120] involved a minor revision in the companywide Insurance Plan. Although regarded as an improvement by the Union, it was not a concession in the sense that it met a specific union demand, nor was it a change specifically negotiated. [30] This, in the Respondent's view, may well have fallen within the category of a voluntary adjustment of "error" disclosed by new information. The elimination of the retraining provision, stressed by the Respondent in its brief, occurred after the Union strike capitulation, and, as shown by the findings in section R, above, reflects, if anything, not a deviation from [35] but a stubborn adherence to its bargaining policies during the period of negotiations when the Respondent was seeking to impress on employees that its offer was immutable. The remaining modifications, reported in section O, above, occurred during the postsettlement meetings and are of little value in appraising the Respondent's bargaining frame of mind during the period [40] of actual negotiations.[121]

---

[120] See section O, above.

[121] As to practically all of them, the Respondent either gave up nothing [55] or actually improved its position. The Respondent points to its agreement to continue the Burlington and Bucyrus units under the national agreement as the clearest evidence of its good faith. However, I do not understand that any claim is being made in this case that the Respondent was seeking to rid itself of the Union. The issue of good—or bad—[60] faith in this case turns on entirely different considerations, to which the point made by the Respondent is irrelevant.

Intermediate Report.

As already noted, the ultimate issue in this case, whether the Respondent's overall conduct in the negotiations constituted good—or bad—faith bargaining, cannot be decided on the basis of the substantive positions [45] the Respondent took, but must rest on "inference based on more or less persuasive manifestations of [its] state of mind." Some of the considerations bearing on that point have already been stated. Others, disclosed by its contemporaneous conduct away from the conference room and by its behavior at the bargaining table, other than as shown by its stand on substantive [50] issues, will be covered below.

93

(6)

The Respondent's communications program and related conduct, now to be considered, bears significantly on the frame of mind with which [5] the Respondent participated in the 1960 negotiations.

The Respondent's communications program has been dealt with in various sections, above.[122] As has been seen, the Respondent through its extensive employee communication system (a) anticipated the Union's [10] major bargaining demands long before the start of negotiations and began to condition employee attitudes to a favorable reception of its views and rejection of the Union's conflicting positions; (b) after the presentation of the Union's demands but before the actual start of negotiations, vigorously criticized the Union's demands as endangering job security and [15] questioned the motives of the IUE leadership; (c) during the negotiations, continued along the

[55] [122] For a general summary covering the period after the start of negotiations, see section F(3).

lines above indicated, and, in addition, presented, at some plants practically on a daily basis, reports on the progress of negotiations, highly slanted in its favor; and (d) following the presentation of its offer deluged employees with communications designed to induce them [20] to pressure the Union into acceptance of its offer, to discredit the motives and integrity of the IUE leadership, and to achieve other objectives presently to be more specifically adverted to.

It was found in section C(1), above, that the Respondent's approach [25] to collective bargaining has as its keystone the direct marketing to employees of management bargaining positions on bargaining issues designed to induce employee pressures for union acceptance. The character of the communications the Respondent issued relating to the 1960 negotiations confirms the validity of that finding.

[30] As is evident from Parker's and Moore's remarks to managerial and supervisory employees during their swing around the GE chain in the prenegotiation period—see section C2, above—and as is apparent also from the content of the communications, the Respondent's underlying approach [35] appears to assume, where bargaining issues are concerned, that its employees should be regarded as standing in the position of customers with both the Respondent and the Union competing for their allegiance, trade and support. Such an approach is scarcely conducive to good-faith bargaining, which presupposes that both parties will enter the conference room "with an open [40] mind and a sincere desire to reach an agreement in a spirit of amity and cooperation."[123] It discourages co-

[123] See, *e.g.*, *N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 875; [60] *N. L. R. B. v. Atlanta Broadcasting Co.*, 193 F. 2d 641, 642 (C. A. 5).

operation between management and the employees' bargaining representative by setting off one against the other; breeds resentment, distrust and friction; tends to constrict bargaining mobility because of positions publicly taken; and introduces into [45] deliberations considerations extraneous to bargaining that serve to divert the attention and energies of the negotiators from their main business at hand, the negotiation of an agreement. The underlying concept of the Respondent's approach, that the Union is a competitor for employee support rather than the voice and ears of the employees it represents, reflects [50] adversely on the quality of the Respondent's recognition of the Union and on the degree of its acceptance of the principles, processes and procedures of collective bargaining. While not controlling in itself, it is a circumstance that must be taken into account in assessing the Respondent's other conduct in this case bearing on its negotiating frame of mind.

94

What has just been said is not meant to suggest that it is unlawful as such for an employer to communicate to his employees his positions on subjects involved in bargaining or to report to employees on the progress of bargaining.[124] Nor is it meant to suggest that it [5] is in-

---

[40] [124] The Board in a number of cases has declined to base 8(a)(5) findings upon such communications alone, where "in their context and in the context of events [they] were not shown to have been unlawfully motivated." See, *Fitzgerald Mills Corporation*, 133 NLRB 877, 882, [45] note 20, where the cases so holding are collected along with summary descriptions of the nature of the communications involved in each. On the other hand, the Board, with court approval, has considered employer communications to employees as evidence of bad-faith bargaining, where it has found that the communications, in the context of other [50] relevant circumstances, reflected an intent, not simply to inform the employees, but to undermine the representative status, authority or prestige of the Union, as part of a program to evade bargaining obligations under the Act. See, *e.g., Fitzgerald Mills, Inc., supra*, enfd. (C. A. 2) 52 LRRM 2174, 2179; *N. L. R. B. v. Reed & Prince, Inc.*, [55] 112 F. 2d 874, 882 (C. A. 1), enfg. 12 NLRB 974.

trinsically unlawful for an employer to criticize during the course of bargaining the union with which he deals or its leadership. What we are concerned with here is not the legality of the Respondent's communications *per se*, but the Respondent's 1960 bargaining frame of mind as it may be revealed in part by its use of the communications.

[10] I do not understand the General Counsel to claim more, though in one respect his position appears equivocal. At oral argument, the General Counsel agreed—although theretofore his position at the hearing had been variable—that he did not intend to charge a "*per se* violation" [15] by the allegation of his complaint relating to the Respondent's efforts to persuade the employees to "accept" its August 30 offer.[125] However, the General Counsel continued to assert, as he does in his brief, that the Respondent's direct appeals through its communications program to employees as individuals to "accept"—the word is the General Counsel's, [20] not the Respondent's—the Respondent's bargaining positions constituted a form of "direct bargaining" within the interdiction of the *Medo Photo* principle.[126] If so, this would of course spell out a claim of an independent violation. The point, however, is unimportant, for I am persuaded in any event that, except for the direct local bargaining earlier [25] considered, the *Medo Photo* principle has no direct application to the facts of this case. The communications program undoubtedly reflects that the Respondent sought primarily to deal with the Union through the employees rather than with the employees through the Union, thus distorting the accepted

[125] As to the companion allegation, relating to the Respondent's "campaign" to discredit and impugn the motives and abilities of the IUE leadership, the General Counsel made it clear from the beginning that he did not claim this as an independent violation.

[60] [126] *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678.

approach. But the Respondent did not seek to *conclude* agree- [30] ments with the employees, or to displace the Union as the contracting party, only to influence employees to bring pressure to bear on the Union's leadership that would force the Union, as their bargaining agent, to accept the Respondent's terms.

[35] But though the communications may have been lawful or even "protected," standing alone, they are nevertheless relevant to the ultimate issue here involved—the state of mind with which the Respondent entered into and participated in the negotiations.[127] For example, the Respondent's

very use of its communications program supplies some basis, although not alone enough, for an inference that the Respondent, having followed its "fair, firm offer" approach to bargaining in that respect, also followed it in others, thereby precluding genuine bargaining for reasons earlier found. [5] More important, a showing that the Respondent's communications program was such as to disclose a determination on its part to rely *entirely* on its effectiveness to achieve acceptance of its contract proposals would provide a basis for an inference that it was sitting out the negotiations while waiting for that program to have its corrosive effect, and was [10] therefore engaging in negotiation with an attitude that was one of evasion rather than fulfillment of its statutory obligation. Of course that

[127] See quotation from separate opinion of Frankfurter, J. in the *Insurance Agents* case, *supra*. The Respondent's defense that Section 8(c) precludes any consideration of the communications as evidence will be considered later.

inference would not along be enough to establish the ultimate conclusion, and would have to be rejected, for example, if shown to be inconsistent with the Respondent's actual conduct at the bargaining table. On the other hand, [15] other manifestations of bad faith at or away from the bargaining table would buttress it. As stated by Frankfurter, J. in the *Insurance Agents* case, *supra*, at p. 508:

> The Board's function in the enforcement of the duty to [20] bargain does not end when it has properly drawn an inference unfavorable to the respondent from particular conduct. It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly [25] its conduct at the bargaining table.

Similarly, a showing that the Respondent considered itself bound by expressed policies or positions that "obstruct[ed] or inhibit[ed] the actual process of discussion, or—reflect[ed] a cast of mind against reaching agreement"[128] [30] would also supply a basis for an inference of bad faith.

The character, content and volume of the Respondent's communications program that followed the presentation of its offer—along with its other contemporaneous conduct, some of it containing independent indicia of bad [35] faith—supports, I am persuaded, the several inferences suggested above—and this for the reasons that follow.[129]

---

[128] *N. L. R. B. v. Katz, supra.*

[129] The Respondent's communications program prior to August 30 also lends [40] support for such inferences, but only because of what followed. It should be noted, moreover, that the Respondent's communications prior to August 30 are not wanting in independent indicia of bad faith. Thus, as appears from findings earlier made, the Respondent in its communications to employees

(Footnote continued on following page)

The factual findings earlier made leave little doubt of the Respondent's determination to rely primarily on its employee communications program rather than on negotiations as the means of gaining acceptance of its offer. Thus, Moore in his swing around the GE chain in early 1960 made clear to management personnel that the solution of the 1960 negotiating problems would depend on the Company establishing through its written and oral communications its "credibility" on which it might draw "this fall when the votes are cast whether the folks believe you or believe the opposition." Long before negotiations began, the Respondent laid out, [10] and thereafter followed, a carefully designed program to condition employee attitudes and opinions for the favorable reception of the Respondent's offer and rejection of the Union's competing demands. The paramount importance the Respondent assigned to direct employee persuasion over negotiations is clearly illustrated by its insistent haste in publicizing its offer so [15] that it might get underway the elaborate communications program it had in readiness, despite the Union's reasonable request that such publication be with-

(Footnote continued from preceding page)

criticized to employees the Union's demands before [45] first discussing them with the Union, placed a cost estimate on the Union's demands that it later declined during negotiations to justify to the Union, and as to some subjects argued its positions more fully to employees than it did to the Union in the conference room, thereby indicating that it was more concerned with marketing its positions to [50] employees than with persuading their bargaining agent. (*Cf. General Electric Co. v. Gojack*, 68 F. Supp. 686.) The Respondent's one-sided reporting to employees of the progress of the negotiation, while professing a purpose to keep employees "fully informed," is, I find, a further reflection of a lack of good faith. It is also noted that [55] during this period the Respondent, in anticipation of its upcoming offer, stressed its "fair, firm offer" approach to collective bargaining, pointing out, *inter alia*, its policy to put *everything* in its original offer shown by its own thorough research to be "right," not to engage later in haggling or horsetrading, and not to improve its offer because [60] of union belligerence, or to avoid a strike or threat of strike. Taken by and large, however, the communications prior to August 30, had they stood in this case alone, would not, in my opinion, have been sufficient to support a substantial inference of bad-faith bargaining.

held so as not to interfere with bargaining. After presentation of its offer, the Respondent's communications program relating to the negotiations reached massive proportions, thereafter maintained until the [20] end of the strike.[130] The offer, along with the Respondent's justifications for it, was orally presented to employees at plant meetings in a manner calculated to minimize the influence of collective bargaining, to impress upon employees that the Respondent had gone as far as it could without endangering the future of its business and the security of employee jobs, [25] and to make it appear that the only alternative to acceptance was a "longpay-losing strike." At about the same time, the Respondent began, and thereafter continued, to deluge employees with communications, numbering to some plants at least one and sometimes as many as three or four a day, in the form of plant newspapers, daily bulletins, letters to homes, [30] newspaper ads, radio and television messages, etc., extolling the merits of its offer and advancing the Respondent's positions on other issues as they arose, while continuing in the meantime to provide employees with reports, highly slanted in its favor, on the daily course of the negotiations. The Respondent also instructed its supervisors not only to impress [35] upon employees the merits of the Respondent's bargaining position, but also to sound out employee reactions thereto. In addition, the Respondent invited and encouraged employees to discuss directly with plant management questions they might have about the offer, and at one large plant held a series of roundtable meetings for that purpose. The Board has held it to [40] be a form of bypassing, and hence evidence of bad faith, for an employer

[130] See sections F(3), J, N, and P(3), above.

to invite employees to talk directly to management about bargaining matters, or to seek to learn directly from employees their reactions to his bargaining position.[131] It is accordingly so found in this case.

[45] The very massiveness of the communications program is itself a measure of the Respondent's determination to deal essentially, not with the employees through the Union, but with the Union through the employees, evidencing, I find, a purpose to undercut not only the Union's bargaining position, but its authority as bargaining agent as well. The Respondent, [50] to be sure, was not seeking to undermine the Union in the sense of displacing it as the employee representative whose ultimate consent would be required for a contract. But the question here is not whether the Respondent's conduct was illegal *per se*—I have already found it was not. Rather, it is whether such conduct tends to support at least a tentative inference of a [55] frame of mind antithetical to simultaneous good-faith bargaining in the conference room. I think clearly it does.

97

Clear corroborating support for such an inference is found in the Respondent's course of conduct which immediately followed the IUE convention, at which the IUE negotiating committee passed a resolution calling for Local votes on the question of acceptance or rejection of [5] the Respondent's offer. The Respondent's reaction to that resolution, described in section N, above, vividly points up (1) the Respondent's utilization of its direct approach to

---

[60] [131] *Tex-Tan, Inc.*, 134 NLRB 253, 274; *Crater Lake Machinery Co.*, 131 NLRB 1106; *cf. Harcourt & Co., Inc.*, 98 NLRB 892, where the Board found such conduct violative of 8(a)(1) but not of 8(a)(5).

employees to undercut the Union's bargaining position, authority and prestige; (2) its reliance on that approach as a substitute for genuine bargaining; and (3) the inhibiting [10] impact of that approach on its bargaining frame of mind.

Thus, as has been seen—see section N, above—the Respondent immediately reacted to the convention resolution by interjecting itself into an area, recognized by law to be exclusively one for internal union [15] regulation and of no legitimate employer concern.[132] Bypassing the Union, it contacted IUE Local officials directed in an effort to persuade them to alter the time fixed for the balloting and the question to be voted on. To induce acceptance of its proposals and gain employee support therefor, it offered, *inter alia*, to pay for employee time lost in voting and, at [20] some places, for voting facilities and employee transportation. At the same time, the Respondent loosed a virulent attack on the Union's election plans and on the motives and integrity of the IUE top leadership, containing in part misrepresentations of fact. The tactic of attacking the motives of the IUE leadership had been decided upon as a communications approach [25] long in advance of the negotiations. Considered in the context of accompanying events, the Respondent's aforesaid conduct was, I am persuaded, motivated by a deliberate purpose to undermine the authority and prestige of the union leadership as an aid to the Respondent's direct "selling" bargaining approach. It constituted, I find, a further reflection of an [30] attitude inconsistent with good-faith recognition and dealing with the Union.[133]

---

[132] *Wooster Division of Borg-Warner Corp.*, 113 NLRB 1288, 1294, aftd. 356 U. S. 342.

[50] [133] See *N. L. R. B. v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 881, 882 (C. A. 1); *N. L. R. B. v. Fitzgerald Mills* (C. A. 2), 52 LRRM 2174, 2179.

When, on September 8, the negotiations recessed for the IUE convention, there had been only seven meetings with the Respondent's offer [35] on the table. Under the schedule earlier agreed upon, meetings were to resume on September 20 and continue to the end of the month. The Respondent made no claim then, nor does it now, that an impasse in negotiations had been reached by September 8, nor would such a claim, if made, be valid.[134]

[40] Before meetings resumed on September 20, however, the Respondent, in furtherance of its campaign to induce employees to vote for acceptance of its offer, took steps to announce to employees, *even before it announced to the Union,* that its *full* offer was now on the table and that as a matter of company policy the Respondent would not "up" its offer because of a [45] strike or threat of strike ". . . it never has in the past, and it won't now."

98

To give support to the declarations already being made to employees, the Respondent hastened to announce to the Union, almost as the first order of business when negotiations were resumed on September 20, that its offer was now "final" and would not thereafter be altered, a declaration of [5] position which it thereafter continually reiterated during the negotiations and duly reported to employees. To impress further on employees the credibility of its assertions as to the finality of its bargaining stand,

[134] At the time of the recess, the Union's bargaining position was still fluid, and it continued to remain so after negotiations were resumed. It is noted that the Respondent, following the recess, publicly [55] criticized the Union for not continuing negotiations during the convention, even though the recess had been agreed to when the schedule of meetings had originally been set up. Moreover, it was not until after the September 8 meeting adjourned that the Respondent submitted informally its vacation-holiday options. The Respondent [60] during the negotiations did not actually assert an impasse until October 19.

the Respondent on the same day authorized its operating managers to make effective for nonrepresented employees, as of September 12, the wage [10] increases provided for in the Respondent's basic offer to all unions, and to announce the establishment of other benefits that were to become operative on October 2. Two days later the Respondent, substantially conceding but ignoring the Union's objection that its action would inhibit negotiated modifications, authorized the announcement to nonrepresented [15] employees of the pension changes that were not to be operative in any event until the end of the year. As found above, the Respondent's decision to accelerate the announced establishment for nonrepresented employees of the terms of its 1960 basic offer was an integral part of its program to influence IUE employees to vote for acceptance of the Respondent's offer. [20] The inhibiting effect of that action will be pointed out later.

After the IUE convention, no less than before and during the convention, the Respondent continued to flood the employees with a constant stream of communications plugging the merits of its bargaining positions. [25] In some instances it advanced arguments not only more full but different from those presented to the union negotiators at the bargaining table, a circumstance found herein to constitute the clearest evidence of bargaining bad faith.[135] *General Electric Co. v. Gojack, supra.* The employer communications after the convention, as well as throughout the balance of [30] the negotiations, stressed particularly (a) the finality of the Respondent's offer and the futility of further negotiations; (b) the Respondent's firm policy not

[45] [135] See particularly ERM Stevens' remarks to Schenectady employees on September 21 and comments thereon, reported in section X(o), above.

to enlarge its offer because of a strike or threat of strike, regardless of its duration; (c) the asserted "selfish," "irresponsible" and "political" motives of the IUE leadership; and (d) the asserted [35] jeopardy to employee jobs that would flow from any enlargement of the Respondent's offer or from a strike. As found above, the constant repetition of the theme referred to in (d), above, and the manner of its presentation, were such as to reflect a conscious and deliberate purpose to play on employees' fears and insecurities. The Respondent was careful, generally [40] speaking, to couch its warnings of job jeopardy in the form of predictions that cannot be classified as unlawful in themselves. But the record reflects a number of instances[136] where the warnings were such as to be intrinsically coercive.[137] Considered in the context of accompanying events, the

99

aforesaid communications program reveals that the Respondent's purpose was not simply to keep employees informed of its views on bargaining and related issues, as it professes. It reflects beyond that, I find, a deliberate design to undermine employee faith and confidence in the [5] Union's leadership and in the efficacy of the collective bar-

[136] See, *e.g.*, Waterford letter to employees, dated September 16, *re* strike bringing about a reversal of promotions, downgradings, etc. (section [50] N(6)); foremen warnings to employees at Lynn, *re* danger of GE top management closing down Lynn plant entirely if a strike ensued (section N(6)); letters of Oakland plant manager to striking employees, dated October 7 and October 14 (section P(3)); Lynn letter to employees, dated October 14 (section P(3)).

[55] [137] See *IUE v. N. L. R. B.*, 289 F. 2d 757, 763; *Haynes Stellite Co.*, 136 NLRB No. 3; *Texas Industries, Inc.*, 139 NLRB No. 22. It is noted that the complaint does not allege any independent interference, restraint and coercion by virtue of the communications. The finding made above is relevant only to the Respondent's 8(c) defense to be considered *infra*.

gaining process. It is difficult to reconcile such an effort outside the conference room with an attitude of good-faith recognition and dealing at the bargaining table.

[10] There can be little doubt from the totality of its conduct that the Respondent was determined—certainly after the resumption of meetings on September 20—merely to go through the motions of bargaining in the conference room and to rely entirely on the effectiveness of its direct "sales" approach to employees to resolve the bargaining issues in its favor. [15] Indeed, the Respondent virtually stated as much when in its Union News Bulletin, dated September 21, it declared.

> And so the real scene of negotiations shifts from New York to all IUE-represented plants. The eventual outcome will [20] be decided there—quite properly—quite soon.

The Respondent in its brief stresses that it did not announce the finality of its offer until after the Union's negotiating committee had made apparent its intention to strike the Respondent at the end of [25] the contract term if the Respondent did not improve its offer in material respects. The point the Respondent seeks to make is not entirely clear.[138] However, the Respondent appears to suggest that the announced finality of its offer, as well as the campaign it waged largely on that basis to reduce employee support for strike action, was, no less than the strike threat, [30] a legitimate bargaining pressure tactic from which no inference of bad faith may be drawn. Elsewhere in its brief, the Respondent points to the rule of the *Insurance Agents*

[55] [138] It is evident of course that a threat of strike does not, any more than a strike itself, suspend the obligation to bargain in good faith. [60] *Pecheur Lozenge Co. v. N. L. R. B.*, 209 F. 2d 393 (C. A. 2).

case, *supra,* that bad faith in negotiations cannot be inferred alone from economic weapons designed to exert pressure in collective bargaining. It argues that if "disruptive" pressure tactics [35] of the kind the union in *Insurance Agents* engaged in do not support a refusal-to-bargain charge, then the Respondent's "protected" tactics in this case certainly cannot. The *Insurance Agents* case, however, provides the Respondent with a weak crutch on which to lean.

[40] In *Insurance Agents* there was no claim of bad faith in the actual negotiations. The sole question there was whether the union's pressure tactics, without more, were sufficient to spell out an 8(b)(3) violation. The court's holding was a narrow one (at 490):

> [45] The scope of § 8(b)(3) and the limitations on Board power which were the design of § 8(d) are exceeded, we hold, by inferring a lack of good faith *not from any deficiencies in the Union's performance at the bargaining table by reason of its attempted use of economic pressure but solely and* [50] *simply because tactics designed to exert economic pressure were employed during good faith negotiations.*

In *N. L. R. B. v. Katz,* 343 U. S. 736, 747, the Supreme Court explained its holding in *Insurance Agents* as follows:

> 100
>
> We held that Congress had not in § 2(b)(3), the counterpart of § 8(a)(5), empowered the Board to pass judgment on the legitimacy of any particular weapon used in support of genuine bargaining. But the Board *is* authorized to order [5] cessation of behavior which is in effect a refusal to negotiate, or which directly

obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.

[10] In the instant case, we are concerned not with the legitimacy of the communications and related conduct as such, but with the manner in which they influenced the Respondent's bargaining attitude in the negotiations themselves. As will presently be shown, the record in this case clearly supports a finding that the pressure tactics employed by the [15] Respondent—even assuming their legality otherwise—not only tended to but *did* result in "deficiencies in [its] performance at the bargaining table" that "obstruct[ed] and inhibit[ed]" good faith bargaining. It is to a consideration of this aspect of this case that I now turn.

[20] (7)

Note has already been made of the importance the Respondent attaches to maintaining its credibility with employees for the success of its direct marketing approach to bargaining.

[25] The Respondent's course of conduct was such as to make its continued credibility dependent largely upon intransigence in the negotiations once it presented its offer to the Union, and certainly so once it announced to employees the finality of its bargaining position.

[30] Thus, the Respondent adopted and publicized to employees a bargaining policy under which it committed itself "voluntarily" to include in its original offer *everything* of substance shown by its research to be "right"; to stand firm on that offer except to correct factual errors [35] dis-

closed by new information; and to reject the give-and-take procedures of trading and compromise as a method of resolving bargaining issues. The Respondent emphasized under that declared policy that it would in no event make a change in its offer it believed *not* "right" simply to avert a strike or threat of strike—or, to state the same concept differently, though the [40] Respondent does not formulate it this way, simply to reach an accord. Prior to the presentation of its offer, the Respondent through its communications to employees had already expressed with respect to practically all the Union's significant bargaining demands its firm conviction that they were *not* "right". With the presentation of its offer to the Union, the [45] Respondent mounted, and thereafter maintained, an elaborate sales promotional campaign to impress upon employees the correctness of its offer as opposed to the Union's competing demands, emphasizing also that it had gone in its offer as far as it reasonably could without endangering the future of its business and the security of employee jobs. Then, at a time when the [50] negotiations still had more than 2 weeks to run before the end of the old contract, the Respondent announced to employees the finality of its bargaining position, redeclaring at the same time its firm policy not to yield concessions because of union aggression. Simultaneously, as a tactical measure designed to persuade employees that it meant what it said, the Respondent [55] accelerated the effectiveness for nonrepresented employees of its basic offer. To have enlarged its offer to the Union thereafter would give the lie to its declarations to unorganized employees, and to others as well, that it was company policy "to do right voluntarily," and

that a union could obtain no added benefits it would not otherwise grant.

101

The Respondent thus locked itself into a position where it could not deviate significantly from its original offer without impairing the credibility with employees that it considered so basic to its employee relations and the success of its bargaining techniques.

[5] A willingness to deal with a spirit of cooperation and to maintain a state of mind open to persuasion and to the possibility of altering or modifying on a give-and-take basis positions previously asserted is of the essence of good-faith bargaining. But the course the Respondent took [10] was one that could only lead, once its offer was presented, as in fact it did, to a rigidity in its bargaining attitude that is wholly at variance with such good-faith concepts. And particularly was this so once the Respondent elected to place its bargaining position in a deep freeze by declaring to employees the irrevocable finality of its offer.

[15] The Respondent argues that its course of conduct did not preclude changes in its bargaining position even after the announcement of finality to employees, because it still lay within its power to make them. I suppose that this is so theoretically, but not as a practical matter. [20] For example, the Respondent was scarcely likely to consider in good faith union proposals for significant modifications in its offer in early September while engaged in "selling" the offer directly to employees via the elaborate communication program it had earlier prepared, as one that

had been carefully designed to meet their "needs and desires." And it [25] was even less likely, after declaring to employees in mid-September the finality of its bargaining position and building on that foundation its campaign to persuade employees of the futility of strike action, to weaken the force of its campaign by any action that might show it did not mean what it said. I do not doubt that if the Respondent's attempts to gain [30] direct employee support had met with solid resistance and a lengthy strike, the Respondent might have forsaken considerations of prestige for considerations of expediency and retreated from its earlier declared course. But it was highly improbable that the Respondent would risk impairment of its valued credibility with employees by retreat, except as a last result [35] and only after a strike of some duration, a strike which under such circumstances would itself frustrate statutory policy. And in the meantime, the Respondent's bargaining frame of mind was bound to remain constricted by factors impeding the possibility of genuine negotiations.

[40] The foregoing circumstances, I find, support an inference that the Respondent by reason of its calculated course of conduct so made itself a captive of its own bargaining policies as to substantially inhibit and obstruct good-faith negotiations.

[45] On this record, however, it is unnecessary to rely on inference alone to reach that conclusion.

It will be recalled—see section O, above—that is at the meeting of September 28, after the Respondent had rejected a "within-the-framework" [50] compromise proposal by Union Committeeman Jandreau, Jandreau in-

quired whether there was any possibility of the Company "changing its position one iota." Moore stated in reply there was not, explaining, *inter alia:*

> . . . after telling the employees before they went to [55] vote that this [offer] was it, we would look ridiculous to change it at this late date . . ..

Moore did not dispute the Union's charge that the Respondent had in effect shut out its potentiality for bargaining mobility because of what it had told [60] the employees. He reiterated:

> I said two things—one, that everything we think we should do is in the proposal and we told our employees that, and we would look ridiculous if we changed now.

102

Hilbert's subsequent colloquy with Jandreau at the same meeting—quoted at length in section O, above—is even more illuminating. It leaves little doubt that the Respondent (1) was closely adhering in the 1960 negotiations to the constrictive tenets of its "fair firm offer" [5] approach, and (2) considered itself chained to that approach for reasons of prestige because of its policy declarations to employees and others. This is apparent from Hilbert's statement of "three possible reasons," wherein he asserted in substance (1) that if the Respondent were to change its offer at that time, it would appear as if the Respondent had [10] intentionally held something back from its original offer and, as a result, *"we would look foolish in the eyes of the employees and others";*[139] (2) that a change might have

[139] Both Hilbert and Moore at the same meeting made clear that they did not [55] consider that any significant changes had been made in the offer up to that point. Hilbert declared "the whole thing has been crystallized for a month now, Mr. Carey, and it has been on the table." Moore stated, "We didn't wait until the last day to put forth a proposal, Mr. Jandreau. It was on the table on August 30 and it is all on the [60] table now."

been allowable if the Respondent "made a serious error, an inadvertent error in the offer," but the Respondent had "no evidence of that," and (3) that if the Respondent were to change its offer [15] just to avoid a strike, *"then we would look even more foolish in the eyes of our people and the country."*

There would have been no reason for the Respondent to have looked "ridiculous" or "foolish" to employees by changing its offer, were it not [20] for the fact that through its policy and other declarations to employees it had made its credibility and prestige dependent upon intransigence in the negotiations.

The statements of Moore and Hilbert at the September 28 meeting [25] thus support and confirm the validity of the "locking in" inference stated above.

(8)

[30] I come now to the Respondent's Section 8(c) defense.[140] The Respondent contends that 8(c) by its terms precludes the Board from in any way considering its employee communications as "evidence" to support, directly or indirectly, the alleged unfair labor practice violations. For reasons stated below, I do not agree.

[35] Preliminarily, it must be emphasized again that the legality of the communications or the right of the Respondent to communicate to employees is not the issue involved. The Respondent's communications have been considered

140 "The expressing of any views, argument or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

here only as part of the totality of its conduct reflecting [40] on the state of mind with which it entered into and participated in the negotiations.

The absolutist view the Respondent takes of Section 8(c) is at odds with the legislative history of that section, with the main body of [45] Board and court precedents that relate to it, and with the effectual administration by the Board of the legislative objectives entrusted to it. It is perfectly obvious, to begin with, that Congress could not have intended a strictly literal construction of Section 8(c) which would bar employer expressions from being considered under any circumstances for [50] their probative bearing on unfair labor practices not concerned with the legality of the expressions themselves. Certainly, no one would contend,

for example, that an employer's arguments to a union in the course of bargaining, or to employees where individual or direct bargaining is directly in issue, must be ignored in deciding whether Section 8(a)(5) has been violated. The legislative history of Section 8(c) discloses that [5] Congress' primary purpose in providing that noncoercive expressions should not "be evidence of an unfair labor practice" was to prevent the Board from continuing the practice it had theretofore allegedly followed of linking employer speech with *wholly unrelated* conduct so as to make one or the other illegal.[141] Senator Taft in his analysis of

[141] See, Senator Taft's analysis, 2 Leg. Hist. 1541, 1624; see also, S. Rep. No. 105, 80th Cong., 1st Sess., 23-24 (1947), 1 Leg. Hist. 429-430; [40] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 45 (1947), 1 Leg. Hist. 549; *Pittsburgh S. S. Co. v. N. L. R. B.*, 180 F. 2d 731, 735 (C. A. 6).

Section 8(c) left no [10] doubt that Congress did not intend that section to be so applied as to "make incompetent evidence which would ordinarily be deemed relevant and admissible in courts of law."[142] The Supreme Court has given approval to that view, expressly where noncoercive speech is found to have been used in the furtherance of an unlawful purpose,[143] implicitly in other situations.[144] Various [15] courts have stated that Section 8(c) was intended to do more than restate the principles embodied in the First Amendment.[145]

It is quite clear of course that where, as here, a respondent's state of mind is in issue, it can only be established by circumstantial [20] evidence. What he says, as well as what he does, including his expressions of views, if they are relevant manifestations of his state of mind, constitute competent evidence bearing on that issue, falling within the category of admissions.[146] Thus, in Section 8(a)(3) cases, the Board, with court approval, frequently considers an employer's closely related expressions [25] of views, argument or opinion, although finding them privileged under Section 8(c), as evidence bearing on the issue of his motive in effecting the discharge.[147] Communications to employees

---

[142] 2 Leg. Hist. 1541. Senator Taft cited as an example "statements which might be deemed admissions under ordinary rules of evidence."

[143] *IBEW v. N. L. R. B.*, 341 U. S. 694, 705.

[45] [144] *N. L. R. B. v. United Steelworkers*, 357 U. S. 357. Compare the Court's opinion, particularly at 364, with Chief Justice Warren's dissent. And see Note, 57 Mich. L. R. 615 (1959).

[145] *N. L. R. B. v. LaSalle Steel*, 178 F. 2d 829, 835 (C. A. 7); *N. L. R. B. v. Kropp Forge*, 178 F. 2d 822, 828; *N. L. R. B. v. Bailey Co.*, 180 F. 2d [50] 278, 280 (C. A. 6).

[146] Wigmore on Evidence, 3d ed. §§ 1725, 1731, 1732.

[147] See, *Baker Hotel of Dallas, Inc.*, 134 NLRB 524, 528-529, enfd. (C. A. 5) 51 LRRM 1203; *Southern Desk Co.*, 116 NLRB 1168, 1177, enfd. 246 F. 2d (C. A. 4); *Edward Brothers, Inc.*, 95 NLRB 1451, 1452, note 2.

protected under Section 8(c) have also been held competent evidence in other unfair labor practice situations, where a respondent's state of mind or attitude tends to explain [30] or elucidate the conduct complained of.[148] They are no less so in the situation here involved.[149]

Here, the Respondent's communications program was more closely related to; it formed an integral part of its declared approach to bargaining. [35] Consideration of that program is clearly essential to an understanding of the

Respondent's bargaining frame of mind. To give but one example, the Respondent's attitude at the bargaining table, as reflected by Moore's and Hilbert's statements on September 28, reported shortly above, cannot be interpreted or evaluated except against the backdrop of the communications [5] program.

It must further be noted that many of the statements contained in the communications were *declarations of positions*, rather than expressions of views, argument and opinion in a strict sense. Included within that [10] category are the Respondent's statements concerning its "fair, firm offer" approach, the finality of its bargaining position, and its firm policy not to yield more because of a strike or threat of strike. Declarations of that kind, while not coercive, can scarcely be classified under any reasonable view as the type of expressions 8(c) was designed to exclude [15] from evidentiary consideration if otherwise relevant

[55] [148] See, *e.g., N. L. R. B. v. Power Equipment Co.* (C. A. 6), 52 LRRM 2459, 2462.

[149] *Cf. N. L. R. B. v. Insurance Agents Union, supra*, separate opinion of Frankfurter, J. at p. 506, quoted in subdivision (1) of this analysis.

to the alleged unfair labor practices. Further, as found above, the Respondent's communications were not entirely free from coercive statements, and in some instances held out offers of benefit. The Respondent's communications program, moreover, was closely integrated with other conduct, such as its solicitation of [20] employees to express to company management their views on bargaining issues, the direct interrogation of employees on such matters, efforts to make separate arrangements with local unions relating to the time and wording of the "strike" votes, the acceleration of the effective date of its basic offer for nonrepresented employees, proffers of separate strike-truce terms [25] to certain local unions, etc. The record as a whole fairly supports an inference that the Respondent's entire course of conduct, of which its communications program was an integral part, was aimed at evading its good-faith bargaining obligations. The law is well settled that neither the First Amendment nor 8(c) extends its immunity to speech that merges into [30] and is used in furtherance of a course of conduct designed to violate a statute.[150]

(9)

[35] The findings made in this analysis support a substantial inference that Respondent entered into and participated in negotiations with a frame of mind antithetical to good-faith bargaining. As found in a subsection (5) hereof, the course the Respondent took on substantive issues during the negotiations was not such as to overcome that inference. Other [40] circumstances shown by factual findings,

---

[55] [150] *Gibbney v. Empire Storage Co.*, 336 U. S. 490, 498, 502; *N. L. R. B. v. Virginia Electric Power Co.*, 314 U. S. 469, 478; *I. B. E. W. v. N. L. R. B., supra; N. L. R. B. v. Kropp Forge Co., supra.* See, also, *Fitzgerald Mills,* [60] 133 NLRB 877, 882.

not yet alluded to in this analysis, serve substantially to buttress the inference of bargaining bad faith.

Thus, the Respondent's refusal to furnish the Union with relevant and necessary information, discussed at length in section U(2), above, [45] goes beyond establishing an independent violation of section 8(a)(5). It also strongly supports a finding of overall bad faith.[151] The Respondent's refusal to furnish the information was intimately bound up with its attitude, also revealed by other evidence, that its offer was not open to serious challenge, once presented. The fact that the Respondent had been [50] cooperative in supplying information prior to the start of negotiations, and did after the end of the negotiations furnish some of the requested information, serves only to underscore its take-it-or-leave-it attitude during the critical part of the negotiations.

105

The Respondent's conduct in bypassing the Union as national bargaining agent in an effort to deal directly with IUE Locals on strike-truce terms—as to which concluding findings were made in section U(3), above—also bears significantly on the Respondent's overall bargaining [5] attitude. Manifestly, the Respondent's action in derogation of the Union's status and authority was incompatible with simultaneous good-faith dealing with the Union at the bargaining table. Moreover, the Company's contemporaneous efforts through its massive communications program, which included misrepresentations of fact,[152] to discredit the IUE

[151] *Phelps Dodge Copper Products Corp.*, 101 NLRB 360, 366; *The Kohler Co.*, 128 NLRB 1062, 1085, enfd. 300 F. 2d 699 (C. A. D. C.).

[50] [152] See, particularly, reference in section P(1), above, to Schenectady communications in which the Respondent falsely represented that the offer being made to the Schenectady Local had earlier been made to [55] Carey and rejected by him.

leadership [10] in the eyes of employees, and otherwise to drive a wedge between the Union and its members, supply added support for the findings earlier made relating to the Respondent's reliance on its communications as a substitute for genuine bargaining.

[15] As previously stated, good-faith bargaining contemplates, *inter alia,* a willingness on the part of negotiating parties "to discuss freely and fully their respective claims and demands, and when these are opposed to justify them on reason." The findings made in the sections of this report dealing with the negotiating sessions, particularly those following [20] the presentation of the Respondent's offer, disclose unmistakably that the Respondent's bargaining behavior fell short of that standard. Thus, on August 31—only 1 day after its offer was presented—the Respondent in effect served notice on the Union that it would be futile for the Union even to attempt to persuade it to alter its fixed positions on three of [25] the Union's principal demands—continuation of the cost-of-living escalator, SUB and the union shop.[153] Thus, too, the Respondent at various times registered impatience with the Union's efforts to have it justify its bargaining positions, and at times, when asked to do so, either refused or shifted to other reasons which it stated in terms so vague or arbitrary as [30] to stifle further meaningful discussion. Specific reference is made to the findings in sections H, K and O, above, pointing up various instances where the Respondent justified its positions on the basis of costs, but, when asked for specifications, either brushed aside the Union's request, or, quickly shifting ground, declared that it did not bargain in terms

[153] See, *Duro Fittings,* 121 NLRB 377.

of [35] costs but on the basis of "level of benefits." Reference is also made to the findings in section K, above, relating to the Respondent's refusal to provide the Union with details concerning other wage settlements on which it had asserted it had relied in part in fashioning its wage offer, and its ultimate position that it did not have to justify its wage offer since [40]it bargained "on what is the appropriate thing to do and the level of benefits." A particularly glaring example of the Respondent's avoidance of justifications is to be found in the varying positions it took on the Union's request to move up the effective date of the increases in guaranteed [45] monthly pensions—discussed at length in section Q, above.[154]

The record contains other indicia of the Respondent's bad-faith approach to bargaining. Thus, as shown in section O, above, the respondent at the end of the strike rejected the Union's request for a reduced committee, [50] three on each side, to attempt to work out differences so as to avoid a strike.

106

The rejection alone is of little significance, but the reason given for it is—namely, that the Respondent believed that bargaining should take place only before the full IUE negotiating committee and "*in full view of the public.*" The Respondent's insistence on "gold fish bowl" bargaining [5] is an added indication that it was infinitely more concerned with publicizing its positions directly to employees than

[154] The example cited also points up the Respondent's intransigent attitude generally. Note specifically Moore's repudiation at the September 21 meeting of Hilbert's earlier promise to "consider" the Union's proposed [69] pension plan change, by his declaration that the Company was not "taking anything under advisement for later consideration.

with making an earnest effort to explore the possibilities of finding common ground. The Respondent's refusal on October 14, to produce its pension plan language until full agreement was reached on other documents previously [10] presented, and, more important, its refusal on October 19 to put on the table the complete agreement it was prepared to sign unless and until the Union first expressed its *unqualified* acceptance of the Respondent's proposals, constitute, I find, further evidence of bad faith. Quite clearly, the Union was entitled to see the definitive contract language [15] the Respondent planned to submit—and which the Respondent had indicated it already had prepared—before, not after, committing itself to final acceptance of the Respondent's proposals. For, until such language was produced, the Union could not know what, if any, additional issues might remain open for resolution through the process of collective bargaining.[155] [20] Finally, the Respondent's flat refusal, not satisfactorily explained, to enter into a strike settlement agreement labeled as such, or one bilateral in form, and its insistence upon substituting a "letter of intent," provides, I find, a further reflection of its bad-faith approach to bargaining. [156] It discloses the Respondent's determination to adhere to [25] the end to its basic bargaining philosophy, that employees must be made to understand that what it did it did "voluntarily" and that

---

[45] [155] Indeed, as events proved, the Respondent's refusal to provide contract language prior to the strike settlement prevented the Union from knowing precisely the position the Respondent would take on two issues [50] which became a matter of controversy during the postsettlement period.

[156] This finding is limited to the Respondent's refusal to enter into a strike settlement agreement as a matter of policy, so declared to the mediators and the Union. Contrary to the contention of the General Counsel and the Union, however, I find that the Respondent [55] did negotiate with the Union as to terms and conditions that were to govern the return of strikers.

union belligerence could not force it to make concessions of any kind, even to settle a strike.[157]

[30] (10)

In conclusion, I find on the totality of the Respondent's conduct at and away from the bargaining table, without, however, giving conclusive weight to any separate element, that the Respondent on and after June 13, [35] 1960—as alleged in the complaint—refused to bargain collectively in good faith with the Union as the authorized representative in national negotiations of the employees in the appropriate units referred to in the complaint, thereby violating Section 8(a)(5) and (1) of the Act.

[40] W. *The strike as an unfair labor practice strike*

On all the evidence, I find that the strike which began on October 2, 1960, and extended to October 22, 1960, was caused and prolonged

in substantial part by the Respondent's unfair labor practices in unlawfully refusing to bargain with the Union.[158]

---

[157] The Respondents expressed willingness to allow the Union to initial its "letter of intent" does not alter this conclusion. It is doubtful that the Respondent seriously expected the Union to subscribe to the [60] letter, considering some of its content which would have reflected adversely on the Union. Moreover, even if the Union had done so it would not have altered the character of the letter as a unilateral declaration of company policy for which the Union was entitled to no credit.

[158] *General Drivers v. N. L. R. B.*, 302 F. 2d 908, 911 (C. A. D. C.); *N. L. R. B. v.* [45] *Stackpole Carbon Co.*, 105 F. 2d 167, 175-176 (C. A. 3), cert. den. 308 U. S. 605; *N. L. R. B. v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2)

[5] X. *The discriminatory refusal to reinstate strikers*

As found in section T, above, the Respondent at its Augusta, Georgia, plant refused on October 24, 1960, to reinstate the 20 employees named in Appendix A, all of whom it had replaced while they were out on [10] strike, notwithstanding their unconditional offer to return to work. As the strike was an unfair labor practice strike, the aforesaid employees were entitled to reinstatement on request to their former or substantially equivalent positions.[159] It is found that the Respondent, by denying them such reinstatement, violated Section 8(a)(3) and (1) of the Act.[160]

[15] The complaint also alleges that the Respondent at Augusta, Georgia, independently violated Section 8(a)(1), by reason of the letter sent four striking employees on October 5, 1960. Although the question is closed, Board precedents appear to support the General Counsel's claim [20] that the particular phrasing of the letter was such as to be coercive within the meaning of Section 8(a)(1).[161] However, the Respondent corrected the letter promptly after its attention was called to the illegal phrasing, and

---

[159] *Mastro Plastics v. N. L. R. B.*, 350 U. S. 270, 278.

[160] It is noted that one employee, J. L. Cline, who was offered employment [50] on November 4, 1960, conditioned on his ability to pass a physical examination, was not rehired because of his inability to pass the examination. The unlawful discrimination against Cline had, however, earlier occurred when he was denied reinstatement. The Respondent did not generally require returning strikers to pass physical [55] examinations. It is to be assumed that the requirement was imposed on Cline and the two others offered reemployment after October 24, because the Respondent treated them as if they were being reemployed, rather than as returning unfair labor practice strikers entitled as of right to reinstatement. Accordingly, the same remedial [60] order will be provided for Cline as for the others.

[161] *G. & S. Electric Co.*, 130 NLRB 961, 966-7; *National Gas Co.*, 99 NLRB 273, 281; *United States Cold Storage Co.*, 96 NLRB 1108, 1109.

before any action was taken against the employees. Because of such mitigating circumstances, and also bearing in mind that the coercion [25] inherent in the original letter could have been the result of inartfully chosen language rather than deliberate design, and that this was the only instance of its kind in some 115 IUE bargaining units covering some 70,000 employees, I do not think that the violation alleged is such as to call for a separate unfair labor practice finding and a remedial order [30] based thereon. Consequently, I shall recommend dismissal of the independent 8(a)(1) allegation based on the October 5 letter

IV. The Effect of the Unfair Labor Practices Upon Commerce

[35] The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations as set forth in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to [40] labor disputes burdening and obstructing commerce and the free flow of commerce.

108

V. The Remedy[162]

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act, I [5] shall recommend that it cease and de-

[162] After oral argument, the General Counsel submitted a proposed order with accompanying comments, and the Respondent and the Union submitted [55] written comments relating to the proposed order. The aforesaid documents have been considered and are filed in this proceeding as extensions of the parties' briefs.

sist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent, at its Augusta, Georgia, plant discriminatorily refused reinstatement to the employees listed in [10] Appendix A, hereto attached, on October 24, 1960. It will accordingly be recommended that the Respondent offer each of such employees—except W. A. Chalker and Lonnie M. Usry—immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges.[163] It is further recommended [15] that the Respondent make each of the employees listed on Schedule A whole for any loss of pay he may have suffered by reason of the discrimination from October 24, 1960, until the date of the Respondent's offer of full reinstatement or earlier grant thereof, in a manner consistent with Board policy as set forth in *F. W. Woolworth Co.*, 90 NLRB 289, with interest as [20] provided in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.

With respect to the 8(a)(5) violations found, it is not believed that the circumstances of this case require an affirmative order in addition to the cease and desist order provided for, except with regard to the [25] furnishing of information, and this only to the extent that the Union's request for relevant and necessary information has not already been complied with.

With respect to the cease and desist provisions of the Recommended [30] Order relating to the refusal-to-bargain

---

163 If the Respondent following the reemployment of Chalker and Usry, did not reinstate their seniority and other rights and privileges, [60] the requirement of the Recommended Order in that respect shall apply to them also. If any other employee listed in Appendix A has already been offered or granted such full reinstatement, no additional offer need be made as to him.

remedy, certain clarifying comments are in order. *First:* The Order is not to be construed as disturbing the appropriate unit findings made in the representation proceedings referred to in Appendix A, as amended, attached to the complaint. *Second:* The Recommended Order assumes that the Respondent will continue to engage in [35] national level or multiunit bargaining with the Union on a consensual basis. The Respondent has indicated no desire to withdraw from that arrangement. Whether in the light of the historical pattern of bargaining, the Respondent may withdraw in the future, and insist upon entire separate bargaining on a unit-by-unit basis, and, if so, at what time and under what circumstances [40] it may appropriately do so, is a matter not decided here. The purpose of this Order is to remedy the violation that has occurred, not to anticipate other contexts which may arise in the future as to which determination may be required of questions not specifically litigated in this case. *Third:* It is not the purpose of this Order to enlarge or limit the subjects that are to [45] be assigned respectively to national level or to local level bargaining. These are matters to be hammered out by the parties themselves, in negotiations, subject, however, to the requirements of good-faith bargaining, taking into account among other considerations, but not necessarily giving controlling weight to, the pattern of bargaining as it has evolved over the course of [50] years.

109

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

[5] 1. General Electric Company is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[10] 2. International Union of Electrical, Radio and Machine Workers, AFL-CIO, and its constituent locals, listed in Appendix A, as amended (General Counsel's Exhibit 5) of the complaint, are and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

[15] 3. The various certified units of the Respondent's employees referred to in Appendix A, as amended, of the complaint, constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[20] 4. At all times material herein, the IUE and its constituent locals named in Appendix A, as amended, of the complaint, herein collectively referred to as the Union, have been and are now the exclusive bargaining representatives of the employees in the units referred to in said Appendix, [25] within the meaning of Section 9(a) of the Act.

5. By failing and refusing on and after June 13, 1960, to bargain collectively in good faith with the Union in national level negotiations, the Respondent has engaged in and is engaging in unfair [30] labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By refusing on October 24, 1960, to reinstate, upon their unconditional request, the employees named in Appendix A hereto attached, who had engaged in concerted

activities as unfair labor practice strikers, [35] the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor *practices affecting commerce within the meaning of* Section 2(6) and (7) of [40] the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions [45] of law, and upon the entire record in this proceeding, I recommend that General Electric Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

[50] (a) Refusing—in national level bargaining—to bargain collectively in good faith with the IUE* (through its General Electric Conference Board)

[55] (a) on behalf of the IUE as the certified representative of employees of the Company in appropriate bargaining units represented on the IUE-GE Conference Board for purposes of national level bargaining with the Company, and

[60] (b) on behalf of IUE constituent locals which (i) are certified representatives of employees of the Company in

appropriate bargaining units, (ii) are represented on the IUE-GE Conference Board for purposes of

* International Union of Electrical, Radio and Machine Workers, AFL-CIO.

national level bargaining with the Company, and (iii) have duly authorized the IUE (through its GE Conference Board) by virtue of [5] union constitutional requirement or otherwise to bargain on their behalf

with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

[10] (b) Failing or refusing, upon request, timely to furnish the IUE with information necessary or relevant to bargaining issues involved in national level collective bargaining.

[15] (c) Bargaining directly or attempting to bargain directly—while engaged in national level negotiations—with IUE locals which are duly represented for the purposes of national bargaining by the IUE (through its GE Conference Board) concerning subjects then involved in national level negotiations; or offering separately any such IUE local [20] concerning any such subject more favorable terms and conditions of employment than offered to the IUE national level negotiators.

(d) Discouraging membership in the IUE, or in any IUE local, or in any other labor organization of its employees, by refusing to [25] reinstate, upon their unconditional request, any of its employees engaged in concerted activity as unfair labor practice strikers.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to [30] self-organization, to form labor organizations, to join or assist the IUE, its affiliated local unions,

or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activity, [35] except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will [40] effectuate the policies of the Act:

(a) Upon request, furnish to the IUE the following information: (1) the cents per month premium, per employee, and also for employee dependents, of each insurance benefit improvement added to the Insurance Plan [45] provided for in the 1960-1963 Agreement relating thereto; (2) the estimated monthly average net cost per employee, and also for employee dependents, to the Company of each such insurance benefit improvement, computed from the cost estimates prepared and maintained by the Company for its own use in making calculations of that kind; and (3) the estimated average cost [50] in cents per hour per employee of each added increment in Pension Plan benefits provided for in the 1960-1963 Agreement relating thereto, computed from the cost estimates prepared and maintained by the Company for its own use in making calculations of that kind.

[55] (b) Offer to the employees named in Appendix A attached hereto, except W. A. Chalker and Lonnie M. Usry, immediate and full reinstatement to their former or substan-

tially equivalent positions, without prejudice to their seniority or other rights and privileges.

[60] (c) Make whole all the employees listed in Appendix A in the manner set forth in the section entitled "The remedy," for any loss of pay each may have suffered by reason of the Respondent's discrimination against him.

111

(d) Upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Recommended Order.

[5] (e) Post at all its plants, installations and other places of business in the United States, at which bargaining units represented by the IUE or any of its constituent locals are located, copies of the notice attached hereto, marked Appendix B.[164] Copies of said notice to [10] be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notice to employees are customarily posted. [15] Reasonable steps shall be taken by

---

[164] In the event that these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of [55] Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 20 days from the receipt of this report, what steps the Respondent has [20] taken to comply therewith.[165]

Dated at Washington, D. C.

ARTHUR LEFF,
Trial Examiner.

---

[165] In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director [60] for the Second Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Appendix A attached to Intermediate Report.

APPENDIX A

Garney Browning
W. A. Chalker
W. R. Cushman
Brooks B. Faircloth
Thomas Ford
Joe Howell
Charles D. Kennedy
James Knight
G. D. Smith
Jerry Smith
Lonnie M. Usry
Robert Best
Denny G. Boltin
Franklin Harper
Richard Inglett
Joe Knight
James Kyle
Gerald E. Moody
J. L. Cline
Gene Cline

Appendix B attached to Intermediate Report.

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT, in national level bargaining, refuse to bargain collectively in good faith with the INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, (through its General Electric Conference Board)

(a) on behalf of the IUE as the certified representative of our employees in appropriate bargaining units represented on the IUE-GE Conference Board for purposes of national level bargaining with us, and

(b) on behalf of IUE constituent locals which (i) are certified representatives of our employees in appropriate bargaining units, (ii) are represented on the IUE-GE Conference Board for purposes of national level bargaining with us, and (iii) have duly authorized the IUE (through its GE Conference Board), by virtue of union constitutional requirement or otherwise to bargain on their behalf

with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT fail or refuse, upon request, timely to furnish the IUE with information necessary or

relevant to bargaining issues involved in national level bargaining.

WE WILL NOT, while engaged in national level negotiations, bargain directly, or attempt to bargain directly, with IUE locals which are represented for the purposes of national bargaining by the IUE (through its GE Conference Board) concerning subjects then involved in national level negotiations; nor will we, with regard to any such subject, offer any such IUE local separately more favorable terms and conditions of employment than we have offered the IUE national negotiators.

WE WILL NOT discourage membership in the IUE, or in any IUE local, or in any other labor organization of our employees, by refusing to reinstate, upon their unconditional request, any of our employees engaged in concerted activity as unfair labor practice strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in any or all such activities, except to the extent that such

rights may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act.

Appendix B attached to Intermediate Report.

WE WILL, upon request, furnish the IUE with information relating to the per employee costs of the improvements in our Insurance Plan and Pension Plans provided for in the 1960-1963 Agreement relating thereto.

WE WILL offer the following employees at our Augusta, Georgia, plant full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges:

Robert Best	Garney Browning
Denny G. Boltin	W. R. Cushman
Franklin Harper	Brooks B. Faireloth
Richard Inglett	Thomas Ford
James Knight	Joe Howell
James Kyle	Charles D. Kennedy
Gerald E. Moody	James Knight
J. L. Cline	G. D. Smith
Gene Cline	Jerry Smith

WE WILL make whole the foregoing employees, and also Lonnie M. Usry and W. A. Chalker for any loss of pay suffered by each as a result of the discrimination against him with interest thereon at the rate of 6 percent per annum.

GENERAL ELECTRIC COMPANY
Employer

Dated ..... By .....
(Representative) (Title)

NOTE:—We will notify any of the above-named employees presently serving in the Armed Forces of the

United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 5th Floor, Squibb Building, 745 Fifth Avenue, New York 22, New York (Tel. No. Plaza 1-5500), if they have any question concerning this notice or compliance with its provisions.

LIBRARY
SUPREME COURT, U. S.

Office
FILED
JAN 12 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1074

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

DAVID L. BENETAR
NORDLINGER, RIEGELMAN, BENETAR & CHARNEY
420 Lexington Avenue
New York, New York 10017
Counsel for Petitioner

ROBERT C. ISAACS
MICHAEL I. BERNSTEIN
STANLEY SCHAIR
Of Counsel

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
A. The Proceedings	4
B. The Facts	5
1. Collective Bargaining Relationship of the Parties	5
2. GE's Approach to Collective Bargaining	5
3. The 1960 Negotiations	6
(a) Informal Prenegotiations Meetings	7
(b) Early Negotiations—July 19-August 11	7
(c) General Negotiations	7
(1) August 16-29	7
(2) The Company's Offer of August 29-30 and the Changes Made Therein	8
(3) The Remainder of the Negotiations, the Strike and the Settlement	9
4. Communications to Employees	10

PAGE

The Reasons for Granting a Writ 11

1. The decision of the Court below is in basic conflict with Section 8(d) of the Act, and with decisions of this Court and of other Courts of of Appeals, and casts into doubt and uncertainty the requirements of the duty to bargain 14

(a) Requirements of Good Faith Bargaining 14

(b) "Predetermined Resolve" 16

(c) The *Katz* Case 19

(d) "Take-It-or-Leave-It" 20

(e) "Unable to Alter a Position Once Taken" .. 21

(f) Area Standards or Pattern Bargaining 23

2. The holding below with respect to petitioner's communications is in conflict with the free speech guarantee of the First Amendment to the Constitution, Section 8(c) of the Act, the decisions of this Court, the decisions of the vast majority of Courts of Appeals and other decisions of the Second Circuit Court of Appeals .. 26

3. The decision below on the personal accident insurance issue conflicts with a decision of this Court interpreting Section 8(d) of the Act and with decisions of the same and another Court of Appeals 32

4. The decision below raises a significant question of federal law which has not, but should be, settled concerning the duty to furnish a union with

PAGE

estimates of the future costs of proposals made by an employer during collective bargaining negotiations 36

CONCLUSION 37

APPENDIX A—United States Court of Appeals Opinions A-1

Judgment A-78

APPENDIX B—Constitutional and Statutory Provisions Involved B-1

APPENDIX C—[Submitted under separate cover]

Decision and Order of the National Labor Relations Board C-1

Intermediate Report of the Board's Trial Examiner C-26

Recommended Order of the Board's Trial Examiner C-258

TABLE OF AUTHORITIES

Cases:

Amalgamated Clothing Workers v. *N.L.R.B.*, 365 F.2d 898 (D.C. Cir. 1966) 30

American Shipbuilding Co. v. *N.L.R.B.*, 380 U.S. 300 (1965) 25

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 31

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 31

PAGE

Continental Oil Co. v. *N.L.R.B.*, 113 F.2d 473 (10th Cir. 1940), *modified and remanded on other grounds*, 313 U.S. 212 (1941) 15, 16
Coppus Eng'r Corp. v. *N.L.R.B.*, 240 F.2d 564 (1st Cir. 1957) 28, 30
Cutler v. *N.L.R.B.*, 395 F.2d 287 (2d Cir. 1968) 18, 25

Division 1142 Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. *N.L.R.B.*, 294 F.2d 264 (D.C. Cir. 1961) 16

Equitable Life Insurance Co., 133 NLRB 1675 (1961) ..33, 35

Frick Co., 161 NLRB 1089 (1966) 17

Gem Int'l Inc. v. *N.L.R.B.*, 321 F.2d 626 (8th Cir. 1963) 30, 31
General Electric Co. v. *N.L.R.B.*, 412 F.2d 512 (2d Cir. 1969) 34

IBEW and Phil Sears Electric Service, TXD-712-69, Case No. 9-CB-1445 (1970) 24
Indiana Metal Prods. Corp. v. *N.L.R.B.*, 202 F.2d 613 (7th Cir. 1953), *cert. denied*, 346 U.S. 856 ..... 29, 30-31
Inter-Mountain Dairymen, Inc., 157 NLRB 1590 (1966) 16, 20
I.T.U. Local 38 v. *N.L.R.B.*, 278 F.2d 6 (1st Cir. 1960) 15, 18, 20

J. S. Dillon & Sons Stores Co., Inc. v. *N.L.R.B.*, 338 F.2d 385 (10th Cir. 1964) 30

Linn v. *United Plant Guard Workers of America*, 383 U.S. 53 (1966) 28

PAGE

McCulloch Corp., 132 NLRB 201 (1961) 22
Memorial Consultants, Inc., 153 NLRB 1 (1965) 17, 20

N.A.A.C.P. v. *Button*, 371 U.S. 415 (1962) 31
N.L.R.B. v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) 25
N.L.R.B. v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952) 13, 18
N.L.R.B. v. *Arkansas Grain Corp.*, 392 F.2d 161 (8th Cir. 1968) 30
N.L.R.B. v. *Colvert Dairy Prod. Co.*, 317 F.2d 44 (10th Cir. 1963) 29
N.L.R.B. v. *General Electric Co.*, 358 F.2d 292 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 4
N.L.R.B. v. *Golub Corp.*, 388 F.2d 921 (2d Cir. 1967) 30
N.L.R.B. v. *Herman Sausage Co., Inc.*, 275 F.2d 229 (5th Cir. 1960) 18
N.L.R.B. v. *Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967) 35
N.L.R.B. v. *Howard Quarries, Inc.*, 362 F.2d 236 (8th Cir. 1966) 31
N.L.R.B. v. *I.B.S. Mfg. Co.*, 210 F.2d 634 (5th Cir. 1954) 15
N.L.R.B. v. *Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477 (1960) 14, 17, 19, 20, 25
N.L.R.B. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 17
N.L.R.B. v. *Katz*, 369 U.S. 736 (1962) 19, 34
N.L.R.B. v. *Laars Eng'r., Inc.*, 332 F.2d 664 (9th Cir. 1964) 30, 31
N.L.R.B. v. *Lion Oil Co.*, 352 U.S. 282 (1957) 35

PAGE

N.L.R.B. v. *Mt. Vernon Tel. Corp.*, 352 F.2d 977 (6th Cir. 1965) 30
N.L.R.B. v. *Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953) 15
N.L.R.B. v. *River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967) 30
N.L.R.B. v. *Rockwell Mfg. Co. (DuBois Div.)*, 271 F.2d 109 (3rd Cir. 1959) 29
N.L.R.B. v. *Threads, Inc.*, 308 F.2d 1 (4th Cir. 1962) .. 29
N.L.R.B. v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956) 16, 36
N.L.R.B. v. *United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955) 15
N.L.R.B. v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) 17

Philip-Carey Mfg. Co., 140 NLRB 1103 (1963), *rev'd in part*, 331 F.2d 720 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964) 17, 22

Scofield v. *N.L.R.B.*, 394 U.S. 423 (1969) 25
Southwire Co. v. *N.L.R.B.*, 383 F.2d 235 (5th Cir. 1967) 29
Specialty Container Corp., 171 NLRB No. 6 (1968) 17

Texas Foundries, Inc. v. *N.L.R.B.*, 211 F.2d 791 (5th Cir. 1954) 22
Thomas v. *Collins*, 323 U.S. 516 (1945) 27
Tower Hosiery Mills, Inc., 81 NLRB 658 (1949), *enf'd*, 180 F.2d 701 (4th Cir.), *cert. denied*, 340 U.S. 811 (1950) 15
Trailmobile Div. Pullman, Inc. v. *N.L.R.B.*, 389 F.2d 195 (5th Cir. 1968) 30

PAGE

Truck Drivers Local 728 v. *N.L.R.B.*, 364 F.2d 682 (D.C. Cir. 1966) 30

Union Carbide v. *N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962) 29, 30

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 17, 24, 25

U.S. v. *Robel*, 389 U.S. 258 (1967) 31

United States v. *American Shipbuilding Co.*, 380 U.S. 300 (1965) 17

United Steelworkers of America v. *N.L.R.B.*, 390 F.2d 846 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968) 15

Winters v. *New York*, 333 U.S. 507 (1948) 31

CONSTITUTION AND STATUTES:

U. S. Constitution, Amend. I ..... *passim*

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*)

Section 8(a)(1) ..... *passim*

Section 8(a)(5) ..... *passim*

Section 8(c) ..... *passim*

Section 8(d) ..... *passim*

Section 10(e) 4

Section 10(f) 4

MISCELLANEOUS:

Anker, *Pattern Bargaining, Antitrust Laws and The National Labor Relations Act*, NEW YORK UNIV. NINETEENTH ANNUAL CONF. ON LABOR, pp. 81-82 (1967) 23

PAGE

BNA "Labor Relations Reporter", November 3, 1969 (72 Analysis 37) 12

Cooper, *Boulwareism and the Duty to Bargain in Good Faith,* 20 RUTGERS L. REV. 653 (1966) 15, 21

Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401 (1958) 17

Forkosch, *"Take It Or Leave It" as a Bargaining Technique,* 3 CALIF. W. L. REV. 43 (1967) 24

Remarks of Senator Ellender, 93 Cong. Rec. 4135 20

Remarks of Senator Pepper, 93 Cong. Rec. 4493 20

Rothman, *The Duty to Bargain in a Non-Compulsory Society.* Address before the Negotiators Seminar, American Newspaper Publishers Ass'n, Chicago, Illinois, October 27, 1960 14

I Legislative History of the Labor Management Relations Act, 1947, 1541 30

II Legislative History of the Labor Management Relations Act, 1947, 1172-73 20

IN THE

Supreme Court of the United States

October Term, 1969

No. .....

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Electric Company,[1] prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit rendered and entered in this proceeding on December 2, 1969.

The Opinions Below

The opinions[2] of the Court of Appeals, not yet officially reported, appear in Appendix A hereto and are unofficially

---

[1] Hereinafter "petitioner," "the Company," or "GE."

[2] There were three separate opinions: A lead opinion by Judge Kaufman, a separate concurring opinion by Judge Waterman and

reported at 72 LRRM 2530. The decision grants enforcement of the decision and order of the National Labor Relations Board (App. C 1-21),[3] reported at 150 NLRB 192, 57 LRRM 1491 (1964), which in turn affirmed and adopted in all respects the Intermediate Report (IR) of its trial examiner (App. C 22-267) officially reported at 150 NLRB 203 (1963).

Jurisdiction

The decision of the Court of Appeals for the Second Circuit issued on October 28, 1969, and judgment thereon was rendered and entered on December 2, 1969.[4] The Company's petition for rehearing in banc was denied also on December 2, 1969, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

Questions Presented

1. May an employer who has been found to have a genuine desire to reach agreement and who meets and confers with the union to that end be adjudged in violation of Sec-

---

an opinion by Judge Friendly dissenting on the main issues presented by the case.

[3] Reference is to Appendix C submitted herewith. The Board's decision was also accompanied by three opinions: One Board member dissented totally from the decision of the majority and another dissented from the majority's views on the main issue in the case. Two Board members also dissented from the finding of a *per se* violation in connection with petitioner's offer of personal accident insurance (see *infra* pp. 32-35).

[4] A copy of said judgment appears in Appendix A hereto (App. A 78-79).

tion 8(a)(5) of the National Labor Relations Act, as amended ("the Act"), by virtue of his adherence to a collective bargaining policy of (a) presenting an offer during the course of bargaining which includes everything he feels is warranted and right, holding nothing back intentionally therefrom for later trading, and (b) changing that offer only when further discussion, changing conditions or the uncovering of new facts indicates that such offer falls short of being right?

2. May the NLRB limit or prohibit the communication of an employer's views, opinions and arguments to his employees in support of this bargaining policy on the ground that they inhibit the making of concessions by the employer beyond those included in his original offer?

3. Was it within the power of the NLRB to hold the employer's bargaining policy and communications illegal in combination and to require the employer either to alter his bargaining policy or to refrain from communicating it to his employees?

4. Does the bargaining order herein (a) meet the standards for clarity and specificity which must accompany any constitutionally supportable attempt to regulate or limit freedom of speech and (b) fairly apprise the employer of what conduct it forbids and what it permits?

5. Is it a *per se* violation of Section 8(a)(5) of the Act for an employer voluntarily to propose an added benefit to the union in a precompulsory bargaining period on the basis that if not accepted the proposal will be negotiable during the compulsory bargaining period but not before then?

6. Is it a *per se* violation of Section 8(a)(5) of the Act for an employer, who has not pleaded inability to pay, to refuse to give estimates of the cost of changes which he has offered in pension and insurance plans when such estimates are necessarily speculative and not matters of fact?

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States and the pertinent statutory provisions of the National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 *et seq.* are set forth verbatim in Appendix B hereto.

Statement of the Case

A. *The Proceedings*

On December 16, 1964, the NLRB issued its decision. The jurisdiction of the Court of Appeals was invoked by the Company's petition to review said decision and order and by the Board's cross-application for enforcement thereof made pursuant to Sections 10(f) and 10(e) of the Act, respectively. Almost two years were then consumed in litigation (taken twice to this Court) concerning the status (as party or intervenor) of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter "the Union" or "IUE") in the court below. This litigation was concluded on October 17, 1966, when this Court denied the Union's petition for certiorari from a decision holding it to be an intervenor. *N.L.R.B.* v. *General Electric Co.*, 358 F.2d 292 (2d Cir. 1966), *cert. denied,*

385 U.S. 898. On October 28, 1969, the court below issued its decision enforcing the order of the NLRB. The Company then filed a petition for rehearing in banc which was denied on December 2, 1969. On the same date the court below rendered and entered its judgment in this case. Thereafter, on December 23, 1969, it stayed issuance of its mandate pending the timely filing of this petition and the disposition thereof by this Court.

B. *The Facts*

1. Collective Bargaining Relationship of the Parties

The case now before this Court arose out of the 1960 collective bargaining negotiations between GE and IUE. These negotiations marked the tenth year of bargaining relationship between the parties and resulted in a signed agreement. It was their seventh national agreement. This agreement (G.C. Exh. 6(G)), incorporating substantial increases in wages and fringe benefits, was reached after three months of intensive negotiations during which a three-week strike occurred. The only previous company-wide strike had occurred fourteen years prior and it did not involve IUE.

2. GE's Approach to Collective Bargaining

The Company's approach to collective bargaining was composed essentially of three elements (App. C 37-42):

(a) On the basis of prior negotiations with the Union and of its own research, it presented during bargaining an offer (described by it as a fair, firm offer) which included everything it felt was warranted and right, holding back nothing intentionally for later trading.

(b) It made known its willingness to change this offer only when further discussion, changing conditions or the uncovering of new facts indicated that its offer fell short of being right.

(c) It made the foregoing policy known to all of its employees through employer-employee communications which were part of a regular system of year-round communications designed to keep employees at all levels informed on a variety of subjects (some related and others unrelated to collective bargaining) of mutual interest to them and the Company. The purpose of the communications on the Company's bargaining policy was to explain the basis therefor and its reasons for adhering thereto.

3. The 1960 Negotiations

Formal negotiations between the parties opened on July 19, 1960. Although the contract did not require negotiations before the middle of August, the Company agreed to a Union request for an early start.

The parties held 45 meetings over a period of three months. The ebb and flow of their negotiations during those months were recorded (albeit not verbatim) in approximately 1500 pages of negotiations minutes. These minutes were received in evidence as G.C. Exh. 2B and provide a chronicle of the bargaining.

Neither the Board's trial examiner, the Board itself, nor the court below found that the totality of the Company's actual conduct at the bargaining table constituted in itself overall bad faith.

We will limit ourselves to a brief summary of some highlights of the bargaining.

(a) Informal Prenegotiations Meetings

At least four informal meetings were held between January and June, 1960. They were devoted primarily to defining and agreeing upon the information to be supplied by the Company for use by the Union in its preparations for and conduct of the forthcoming negotiations.

A fifth prenegotiations meeting was held on June 13, 1960, with the Company's consent, to give the Union an opportunity to present its demands in advance of the commencement of negotiations.

(b) Early Negotiations—July 19-August 11

The Union requested an early start to formal negotiations—earlier than the contract provided. The Company acceded to this request, suggesting that they start about a month ahead of time and that these early negotiations be devoted to the subject of employment security—a subject to which the Union had assigned top priority.

No agreement was reached on employment security before the time fixed by contract (August 16) for commencement of general negotiations and they began as contemplated by the contract.

(c) General Negotiations

(1) *August 16-29*

The next six meetings, all held during this period, were devoted to discussion and argument concerning the Union's demands.

(2) *The Company's Offer of August 29-30 and the Changes Made Therein*

On August 29, GE representatives, at their suggestion, met with top Union officials to give the latter an informal preview of the offer the Company was about to make formally the next day (App. C 88). After hearing it, the Union immediately announced its opposition to the offer (App. C 91), and flatly turned it down the next day when it was formally made at the bargaining table (App. C 217).

The uncontradicted testimony in the record established that the offer of August 30 was not put into final form until August 27, 1960, and the Board so found (App. C 81 & n. 23). Thus, GE did not enter negotiations with a pre-formulated offer but formulated and made its offer only *after* some six weeks of negotiations had taken place.

The offer embodied substantial improvements in the areas of wages, employment security and fringe benefits, as well as Union-assisting provisions in the fields of checkoff, leaves of absence for Union representatives and stewards and pension plan for Union representatives (App. C 88-91).

After the preview and formal submission of its offer to the Union the Company apprised its employees of the terms thereof on August 31. The Union had vigorously opposed this communication by the Company and, as we shall see, the Company was chastised both by the Board and the majority of the court below for refusing to be silenced by the Union's objections.

With the Company's offer on the table, negotiations continued until September 9, 1960, when they were suspended because of an IUE Convention.

Several changes were made in the Company's offer during this period. Although the lead opinion depreciated the significance of the several changes made in the Company's offer (compare A. 12, 44 and n. 13 with App. A 67-68), it is undisputed that all of the changes were in fact made, and (with a single exception) made *after* it had publicized its original offer (App. A 67).[5]

(3) *The Remainder of the Negotiations, the Strike and the Settlement*

On September 20 the negotiations resumed. On September 21 two months had elapsed since the beginning of bargaining, and the Company's offer had been on the table and the subject of active negotiations for three weeks, including eight separate day-long bargaining sessions. The Company confirmed formally on that day what it had mentioned on September 20, namely, that its full offer was on the table and there was no more to come (App. C 68). Actually, several changes had been made in the offer before September 20 and others were made after that date (App. C 68 n. 17). GE, at this time, also authorized its general managers to put into effect for non-represented employees wages and benefits contained in its offer.

On October 2, 1960, the Union struck, but negotiations continued under the auspices of the Federal Mediation and Conciliation Service. Between October 19 and October 22

---

[5] The lead opinion characterized this offer as a "take-it-or-leave-it" offer. This pejorative label was never defined (App. A 65-66). The Board had not described the Company's offer in these terms. Its trial examiner had found (App. C 40) that "contrary to the assertion of the General Counsel, GE does not initially present its offer on an avowed 'take-it-or-leave-it basis' " and, in undeniable fact, the Union neither took the offer as made nor left it. It negotiated for and obtained material modifications therein.

negotiations for a strike settlement took place, and on October 22 a short form settlement agreement was signed and the strike ended thereafter (App. C 69).

Meetings were held between October 27 and November 23 for language drafting and to settle items theretofore left open (*ibid.*).

On November 10, a new three-year agreement was signed (*ibid.*).

4. Communications to Employees

The Company follows a year-round practice of communicating with its employees at all levels on a variety of subjects which are of common interest to them as well as to the Company. During periods of collective bargaining, events connected therewith are especially stressed.

The bargaining-connected communications on which the court below relied for its finding of illegality were primarily concerned with three of the Company views emphasized in its communications program. One was that, by Company policy, when it made an offer, that offer was described as "a fair, firm offer" with nothing intentionally held back for trading; another was that the Company would not yield concessions or offer more than it felt was prudent because of a strike or threat of strike.[6] A third, made about September 21, 1960 (two months after bargaining started), was that the Company had gone as far as it could and that its final offer was now on the table, with no more to come.

[6] But, as found by the Board and court below, GE stated that it is willing to make prompt adjustments in its offer whenever new information or a change in facts indicated that its initial offer fell short of being right (App. C 40, 6; App. A 7, 67, 74).

Although the Company communicated to its employees on many other aspects of the negotiations, it was essentially and basically the communications on these three subjects (App. A 46) which were condemned by the court below as having painted the Company "into a corner on *all* bargainable matters" (App. A 52)[7] and (in the words of the concurring opinion) as having comprised the "dominant wrong" (App. A 56).[8]

The Reasons for Granting a Writ

This petition seeks review by this Court of a finding of overall bad faith in bargaining by the Company and of two *per se* violations of Sections 8(a)(5) and 8(a)(1) of the Act. The reasons for granting review of the latter are set forth at pages 32-37, *infra*, where it is shown that each of them presents conflicts of widespread significance with

---

[7] The lead opinion's view that the Company's communications acted as a restraint on its ability to make concessions is at odds with observations elsewhere in the same opinion which indicate that changes were actually made in the original offer and that all but one of these changes were made *after* the offer was publicized (App. A 12, 44 and n. 13; see also App. A 67-68).

[8] Other aspects of the Company's communications, which the Board described as "disparaging or discrediting" the Union, as exerting pressure on the Union "to submit to the will of the employer," and as creating the impression that "the employer rather than the union is the true protector of the employees' interests" (App. C 5), were emphasized by the Board but not stressed by the majority of the court below. On their face and for the reasons set forth in the dissenting opinion (App. A 69-70), the communications so described fell squarely within the protection of Section 8(c) of the Act.

It should be further noted, as found by the Board's trial examiner, that GE did not seek to conclude agreements with its employees or to displace the Union as the contracting party, but merely to influence employees to bring pressure on their leaders to accept a Company offer (App. C 227, 231).

the existing body of federal law governing labor-management relations.

The key factors relied on to support the central finding of overall bad faith in this case make the decision of unique significance.[9] It marks another in a series of resurgent attempts by the National Labor Relations Board to assume the role of regulatory agency over the substance of bargaining and over the sufficiency of concessions made therein. The decisions of this Court have consistently denied the existence of this power and Congress felt it necessary in 1947 to make this denial explicit by the enactment of Section 8(d) of the Act.

But the Board here did not stop with forbidden intervention into the bargaining process. It extended its reach into the area of free speech where, in defiance of the First Amendment to the Constitution and of Section 8(c) of the Act, it undertook to regulate and condemn the volume and content of the employer's communications to its employees —not because they contained threats or promises of benefit, but because they conveyed a policy of firmness in bargaining of which the Board disapproved.

The host of conflicts which this decision has created with the entire body of constitutional, statutory and case law (laid down by this Court and by Courts of Appeals) may readily be discerned from the following circumstances.

---

[9] As noted in the BNA "Labor Relations Reporter" of November 3, 1969 (72 Analysis 37): "The General Electric case was the *first*, however, in which the National Labor Relations Board sought to deal with an entire approach to bargaining" (emphasis ours). Its uniqueness and importance in the field of labor-management relations is underscored by the fact that the Board's decision in this case and that of its trial examiner have been the subject of at least twenty law review articles.

This Company genuinely desired to reach agreement with the Union and the fact was so found (App. C 207). Moreover, an agreement was reached after three months of negotiations during which the parties met and discussed each other's demands and proposals (G.C. Exh. 2B; App. C 67-69). The pre-existing ten-year relationship between the parties was thereby confirmed and continued.[10] Thus was the traditional test for good faith met by petitioner in this case.

The principal holding of the lead opinion below in support of the Board's conclusion of bad faith, despite these facts, was that the combining of the Company's fair, firm offer approach with its wide publication thereof impermissibly inhibited its ability or freedom to make further concessions[11] beyond those included in its initial offer (App. A 53). By so doing, it approved the Board's reentry into the repeatedly forbidden realm of "sit(ting) in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). By the same token, it nullified the effective force of the First Amendment and of Sections 8(c) and 8(d) of the Act as *independent assurances* to employers and unions alike, of freedom to bargain for one's own terms and freedom to express one's own views, opinions and arguments during the course thereof.

The unsettling effects of this decision and its widespread importance to the entire field of management and labor, we submit, argue forcefully for review by this Court.

---

[10] Ten more years (and three agreements) have since elapsed and the Union represents more of the Company's employees than it ever did.

[11] As we have already seen (*supra* pp. 9, 11 n. 7), the factual fallacy in its conclusion was established by the changes *actually made* by the Company.

1. The decision of the Court below is in basic conflict with Section 8(d) of the Act, and with decisions of this Court and of other Courts of Appeals, and casts into doubt and uncertainty the requirements of the duty to bargain.

(a) Requirements of Good Faith Bargaining

This Court, in *N.L.R.B.* v. *Insurance Agents' Int'l Union, AFL-CIO,* 361 U.S. 477, 488-89, enunciated the nature of the duty to bargain as well as the permissible scope of the Board's inquiry into its performance:

> "It is apparent from the legislative history of the whole Act that the policy of Congress is to *impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement,* in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45. Discussion conducted under *that standard of good faith* may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement, through give and take. . . . *But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.*" (Emphasis ours.)[12]

---

[12] See, confirming this standard, address by the then Board General Counsel, Stuart Rothman, Negotiators Seminar, American Newspaper Publishers Ass'n, Chicago, Illinois, Oct. 27, 1960, *The Duty to Bargain in a Non-Compulsory Society* (pp. 2, 6):

> "The application of *the 'good faith' standard* . . . in the main . . . calls for an evaluation of the parties' subjective state of

The decision below materially altered and basically changed this standard and its scope by the addition to it of a new dimension. Thus, petitioner—in conflict with established authority[13]—was condemned not for negotiat-

---

mind. That is, *the question sought to be answered is whether the parties have negotiated with a sincere desire to reach an agreement.*" (Emphasis ours.)

In this regard the lead opinion (App. A 49-50 n. 17) assertedly saw no basis for disagreement with the portion of the dissenting opinion in *United Steelworkers of America* v. *N.L.R.B.*, 390 F.2d 846 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 904 (1968), which found as "novel and internally inconsistent" the "proposition that a bargainer can be found to have refused to bargain in good faith even while at the same time it is found to have engaged in bargaining in a good faith effort to reach an agreement and has actually reached a final and binding contract." Its ultimate conclusions and the standards of good faith bargaining it actually applied, however, cannot be reconciled with this view of the boundaries of the duty to bargain.

[13] See, in addition, *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); *ITU Local 38* v. *N.L.R.B.*, 278 F.2d 6, 11 (1st Cir. 1960); *Tower Hosiery Mills, Inc.*, 81 NLRB 658, 660 (1949), *enf'd*, 180 F.2d 701 (4th Cir.), *cert. denied*, 340 U.S. 811 (1950); *N.L.R.B.* v. *I.B.S. Mfg. Co.*, 210 F.2d 634, 638 (5th Cir. 1954); *N.L.R.B.* v. *United Clay Mines Corp.*, 219 F.2d 120, 125 (6th Cir. 1955); *Continental Oil Co.* v. *N.L.R.B.*, 113 F.2d 473, 481 (10th Cir. 1940), *modified and remanded on other grounds*, 313 U.S. 212 (1941). Typical of the pronouncements of these cases is that of the First Circuit in the *Reed & Prince* case, 205 F.2d at 134:

"... [T]he question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union."

And see, Cooper, *Boulwareism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653, 673 (1966):

"The Board's opinion in the *General Electric* case may be a considerable departure from previous case law. It appears that the Board decided that the desire to reach an agreement

ing without a genuine desire for agreement, but for pursuing a policy which the lead opinion saw as having inhibited greater concessions than those actually made.[14]

(b) "Predetermined Resolve"

Principal reliance of the lead opinion below for this condemnation was predicated on dictum in the concurring opinion in *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154-55 (1956),[15] to the effect that "a predetermined resolve not to budge from an initial position" is inconsistent with good faith. Its interpretation of that dictum rested on the apparent belief that a sincere desire to reach agreement, in these circumstances, was immaterial.

Until now, however, where the parties have actually met, conferred and negotiated, the Board and the courts have condemned such a predetermined resolve *only* if it was indicative of an intent to frustrate agreement. See, *e.g.*, *Division 1142 Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *N.L.R.B.*, 294 F.2d 264 (D.C. Cir. 1961); *Continental Oil Co.* v. *N.L.R.B.*, *supra* note 13; *Inter-Mountain Dairymen, Inc.*, 157 NLRB 1590,

---

is no longer a defense to the charge of a failure to bargain in good faith."

[14] See, *e.g.*, lead opinion (App. A 46):

"The most telling effect of GE's marketing campaign was not on the Union, but on GE itself. Having told its employees that it had made a 'firm, fair offer,' that there was 'nothing more to come,' and that it would not change its position in the face of 'threats' or a strike, GE had in effect rested all on the expectation that it could institute its offer *without significant modification.*" (Emphasis ours.)

[15] App. A 51-52; but see, in this regard, dissenting opinion below App. A 65-66.

1606 (1966); *Memorial Consultants, Inc.*, 153 NLRB 1, 15 (1965); *Specialty Container Corp.*, 171 NLRB No. 6 (1968) (dissenting opinion).[16] Indeed, where no intent to frustrate agreement exists, this Court repeatedly has recognized that the degree of a bargainer's resolve before entry into and during bargaining is for him alone to decide. See, *United States* v. *American Shipbuilding Co.*, 380 U.S. 300, 309 (1965); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965); and see, *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *N.L.R.B.* v. *Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. at 485-89; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).[17]

---

[16] See also, *Philip-Carey Mfg. Co.*, 140 NLRB 1103 (1963), *rev'd in part*, 331 F.2d 720 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964); *Frick Co.*, 161 NLRB 1089, 1105-06 (1966).

[17] Note, in this connection, the lead opinion's adoption of a "mutually satisfactory accord" standard (App. A 42, 45-46) and its interpretation of "a serious effort to resolve differences and reach a common ground" (App. A 51). "Common ground," in the context of the cases cited in the accompanying text, has not been construed as a middle point or some other point equally "satisfactory" to both parties. If it were so construed, the NLRB's conversion into a regulatory agency over the terms of contracts would become a *fait accompli* in direct contravention of the mandate of the statute which created it and of the interpretations placed thereon by this Court.

Rather, common ground is the point at which the parties agree. Where a union imposes area standards in bargaining, for example, "common ground" is not a "mutually satisfactory" point, but rather the pattern point which the union previously determined elsewhere, *i.e.*, the point from which the union, when it entered negotiations, was predetermined not to budge. (See pp. 23-25 *infra*.)

As stated in Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416 (1958)—cited with approval by this Court in the *Insurance Agents'* case, 361 U.S. at 489-90:

> ". . . The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable."

The failure of the lead opinion below to recognize this principle also runs counter to the admonition of this Court in *N.L.R.B.* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952):[18]

> " . . . [I]t is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Footnotes omitted.)

Indeed, in this regard, the inconsistencies within the lead opinion itself, and as between it and the concurring opinion, point up the multiplicity of problems created by the departures in this case from the established standard. Thus, the lead opinion denied any intent to require "auction bargaining," preclude the "best offer first" bargaining technique, or compel the making of "concessions, 'minor' or otherwise" (App. A 52-53). Then, downgrading the concessions that were made, it proscribed as inconsistent with good faith a predetermined resolve not to yield. Yet a "best offer first" technique—which the majority expressly did not forbid—can only stem from a predetermined resolve to lay on the table all that a party intends to yield. The lead opinion, in short, is internally irreconcilable. It is also irreconcilable, on this point, with the concurring opinion's statement (App. A 55):

---

[18] And to the pronouncements in *e.g.*, *ITU Local 38* v. *N.L.R.B.*, *supra* note 13; *Cutler* v. *N.L.R.B.*, 395 F.2d 287, 290 (2d Cir. 1968); *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229, 231 (5th Cir. 1960). See also, Board concurring opinion (App. C. 11).

"We recognize that a company is entitled to insist on the terms of its original offer if it believes that the union can be made to accept that offer."

(c) The *Katz* Case

Citing the *Katz* case,[19] and the *Katz* case alone, the lead opinion holds that petitioner, by its overall conduct, refused to bargain "in fact" (App. A 53). The *Katz* standard is inapposite and, as applied herein, creates an open conflict with the *Insurance Agents'* case, *supra.*

In *Katz,* the employer *unilaterally* placed into effect certain employee benefits then under discussion with the union during negotiations. 369 U.S. at 737. Its conduct was held to be tantamount to an absolute refusal "even to negotiate *in fact*—'to meet . . . and confer.'" *Id.* at 743. Accordingly, the Court there held (*id.* at 742-43) there was "no occasion to consider the issue of good faith."

Under the decisions of this Court the determination of good faith, on the basis of totality of conduct, has been governed by the standard enunciated in such cases as *Insurance Agents', supra.* To evaluate totality of conduct, as was done here, on the basis of a decision whose facts made such evaluation unnecessary, not only misapplies *Katz* but sets it up as a precedent for totality of conduct cases in conflict with the authorities alone established to govern such cases. See, *e.g., N.L.R.B.* v. *Insurance Agents' Int'l Union, AFL-CIO,* 361 U.S. at 488-89.

---

[19] *N.L.R.B.* v. *Katz,* 369 U.S. 736 (1962).

(d) "Take-It-or-Leave-It"

The lead opinion affixed the label of "take-it-or-leave-it" to petitioner's approach to bargaining (App. A 53). As noted above, note 5 *supra*, use of the label was unsupported by the record. And, as made clear in the *Insurance Agents'* case, it was unsupported in law.

Thus, this Court, in *Insurance Agents'*, defined the term "take-it-or-leave-it" bargaining as the antithesis of bargaining with "a desire to reach ultimate agreement, to enter into a collective bargaining contract." 361 U.S. at 485.[20]

As observed by the dissent below (App. A 65-66):

> "While the lead opinion makes much use of the 'take-it-or-leave-it' phrase, it never defines this. I should suppose it meant a resolve to adhere to a position without even listening to and considering the views of the other side. To go further and say that a party, whether em-

---

[20] Legislative history and decisions of the courts and the Board itself confirm this definition. See, *e.g.*, remarks of Senator Pepper, 93 Cong. Rec. 4493, II Legislative History of the Labor Management Relations Act, 1947, 1172-73:

> "[W]hen any party to a dispute merely takes an adamant position, refuses to hear argument or to consider merit, marches in and throws something down, sits down in a chair and freezes up, and says, 'Take-it-or-leave-it,' that is not collective bargaining. . . ."

And see the remarks of Senator Ellender, 93 Cong. Rec. 4135, cited by this Court in the *Insurance Agents'* case, 361 U.S. at 487 n. 13.

See also *ITU Local 38* v. *N.L.R.B.*, *supra* note 13; and see, *e.g.*, *Memorial Consultants, Inc.*, 153 NLRB 1 (1965), and *Inter-Mountain Dairymen, Inc.*, 157 NLRB 1590 (1966), where the Board, adopting in whole the trial examiners' decisions therein, equated "take-it-or-leave-it" with, respectively, a refusal to "bargain with the purpose of coming to an agreement" (153 NLRB at 15) and a "covert determination to forestall a contractual consensus" (157 NLRB at 1606).

ployer or union, who, after listening to and considering such proposals, violates §8(a)(5) if he rejects them because of confidence in his own bargaining power, would ignore the explicit command of §8(d)—as Judge Waterman recognizes. . . .

"It must be equally true that an employer is not to be condemned for 'take-it-or-leave-it' bargaining when, after discussing the union's proposals and supporting arguments, he formulates what he considers a sufficiently attractive offer and refuses to alter it unless convinced an alteration is 'right'." [21]

(e) "Unable to Alter a Position Once Taken"

The crux of the majority's holding is that the purpose or necessary effect of petitioner's conduct was to place petitioner in such a frozen state that it was "unable to alter a position once taken" (App. A 53-54).[22] Insofar as this concept was predicated on petitioner's policy of implementing certain benefits for non-union employees prior to the completion of negotiations with the unionized em-

---

[21] See, Cooper, *Boulwareism and the Duty to Bargain in Good Faith, supra* note 13, commenting on this aspect of the case at bar:

"Previous cases have condemned take-it-or-leave-it bargaining, but only on a showing that the employer had no desire to reach an agreement.[89] This is a significant change in the law. . . ."

"[89] See Note, 76 HARV. L. REV. 807, 811 n. 38 and accompanying text (1963)."

[22] As stated by the concurring opinion (App. A 55):

". . . [P]ublicity regarding firmness tends to make the company seal itself into its original position in such a way that, even if it wished to change that position at a later date, its pride and reputation for truthfulness are so at stake that it cannot do so."

ployees,[23] it has been expressly rejected by the Court of Appeals for the Fifth Circuit in *Texas Foundries, Inc.* v. *N.L.R.B.*, 211 F.2d 791 (1954), setting aside 101 NLRB 1642, and with the Board's own decision in *McCulloch Corp.*, 132 NLRB 201 (1961).[24]

In *Texas Foundries*, the Fifth Circuit set aside the following holding of the trial examiner,[25] adopted in whole by the Board (101 NLRB at 1666, 1668):

> ". . . [The employer] determined in advance of negotiations to *announce* . . . [its wage] increase simultaneously with its offer to the Union as immediately effective for nonunit employees. . . . [A]s the Respondent admittedly knew, and inferentially intended, the practical effect of converting its proposal to the Union into an accomplished fact for nonunit employees was to freeze solidly its bargaining position with the Union. Stated differently, the Respondent knowingly precluded

---

[23] See lead opinion (App. A 47 n. 15).

[24] See also *Philip-Carey Mfg. Co.*, *supra* note 16, where the Board reversed a similar holding by the trial examiner (140 NLRB at 1104) that the employer unlawfully had "locked" itself into "a policy [which] necessarily envisaged no further concessions, no matter how protracted the bargaining or how persuasive the arguments for concessions advanced by the Union" (*id.* at 1121). There, unlike here, the employer's first offer was presented as its "final" offer. There, unlike here, the employer did not deviate from that offer as to any matter deemed objectionable by the union; the only deviation was a "minor deviation" on a "nonmonetary" issue (*id.* at 1105, 1115, 1121-22). And there, unlike here, the only concessions made occurred *before* the employer presented its offer and pertained only to "a few issues," notably the first-contract establishment of a grievance and arbitration procedure and the "narrow[ing]" of the area of disagreement with respect to "some minor matters" (*id.* at 1114).

[25] The same trial examiner as in the case at bar.

itself, in light of its *stated policy,* from thereafter seriously considering compromises of the Union's fringe demands on a give and take basis. . . .

". . . [A]n employer, faced with a choice, may not wilfully preclude himself from genuine collective bargaining with the legal representatives of the organized group, by taking action with regard to the unorganized employees, *the purpose or necessary effect of which he knows will freeze his stand in his negotiations with the legal representative of the organized group.*" (Emphasis ours.)

In setting aside the Board's decision in *Texas Foundries,* the Fifth Circuit rejected and discredited the very theory upon which the Board, with approval of the Second Circuit, here relied.

(f) Area Standards or Pattern Bargaining

Parties to collective negotiations, due to their public or bargaining table "commitments," often have been no less "frozen" or "locked" into a position than was petitioner. Perhaps, the clearest example is that involving area standards or pattern bargaining[26]—recognized as valid by this

---

[26] Defined as follows in Anker, *Pattern Bargaining, Antitrust Laws and the National Labor Relations Act,* NEW YORK UNIV. NINETEENTH ANNUAL CONF. ON LABOR, pp. 81-82 (1967):

". . . [U]nions and employers have shown increasing interest in bargaining techniques which will produce uniformity in terms and conditions of employment . . . . When a union, having negotiated an agreement at one unit, or with one employer, seeks to obtain the same agreement in other units or from other employers, it is engaging in one form of 'pattern bargaining,' perhaps the most familiar one. Employers, of course, often engage in the same kind of pattern bargaining. . . ."

Court in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

In conflict with the *Pennington* case, and without ever attempting reconciliation therewith or with the widespread practice it endorses as valid, the lead opinion below stated (App. A. 47):

> "The Company, having created a view of the bargaining process that admitted of no compromise was trapped by its own creation. It could no longer seek peace without total victory, because it had by its own words and actions branded any compromise a defeat." [27]

As recognized by the dissent below (App. A. 67), the decision herein

> ". . . would seemingly outlaw practices that no one has considered illegal up to this time. A union that has won a favorable contract from one employer and has broadcast that it will take no less from others seems to me to be quite as 'unable to alter a position once taken' as GE was here, yet I should not have supposed this violated the Act. So also with an employer who has negotiated a contract with one union and has proclaimed that he will do no better for others. To say that taking such positions violates §§8(b)(3) or 8(a)(5) is steering a collision course with §8(d)." [28]

---

[27] Compare Forkosch, *"Take It Or Leave It" as a Bargaining Technique*, 3 CALIF. W. L. REV. 43, 55 (1967):

> "When an 'area standard' contract is presented to the employer . . . if there is any breakthrough for one employer or in one respect then all others seek it and chaos results."

[28] See, also, concurring Board opinion (App. C 12-13); and see, in this regard, a recent decision of the Trial Examiner Ivar Peterson in *IBEW and Phil Sears Electric Service*, TXD-712-69, Case No. 9-CB-1445 (released January 2, 1970), holding illegal a union's attempt to impose an area standards contract, explicitly on the basis of the precedent established in this case.

This Court has recognized that, in the end, it is not the announced posture of the parties but rather their relative bargaining strengths which determines whether and to what extent they will yield. See, *e.g., United Mine Workers* v. *Pennington,* 381 U.S. at 668; *N.L.R.B.* v. *Insurance Agents' Int'l Union,* 361 U.S. at 489, 495; *American Shipbuilding Co.* v. *N.L.R.B.,* 380 U.S. 300, 309 (1965); *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 181 (1967); *Scofield* v. *N.L.R.B.,* 394 U.S. 423, 432 (1969).[29] As best expressed in the *Pennington* case, 381 U.S. at 668, in each case a party must

> "... assess ... the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective ... should temporarily give way."

---

[29] See, also, *Cutler* v. *N.L.R.B., supra* note 18. There, the union, prior to negotiations, unilaterally amended its minimum wage scale and welfare plan by-laws. These amended by-laws constituted the union's demands. Union members working for anything less than the amounts prescribed by the by-laws were threatened with fines. It is hard to imagine how the union there could have been any less wedded to its position than was petitioner herein. Yet, as stated by the court, 395 F.2d at 290:

> "Whether ... [the employer] would have to meet these demands would depend upon the *relative bargaining power of the parties.* Concededly, in the present case, the bargaining power of ... [the union] so greatly exceeded that of ... [the employer] that *he would be almost compelled to accede to most of the union's demands.* But it is no violation of the Act for a labor organization to be economically powerful.[9] ...
>
> "[9] As the Supreme Court has said, '(t)he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.' NLRB v. Insurance Agents' Int'l Union, supra at 489."

2. The holding below with respect to petitioner's communications is in conflict with the free speech guarantee of the First Amendment to the Constitution, Section 8(c) of the Act, the decisions of this Court, the decisions of the vast majority of Courts of Appeals and other decisions of the Second Circuit Court of Appeals.

Petitioner's communications have been treated by the Board and the majority below not merely as evidence of an unfair practice but as part and parcel of the unfair practice itself.[30]

The question here presented for review, therefore, is whether—the First Amendment and Section 8(c) of the Act to the contrary notwithstanding—the National Labor Relations Board may regulate such communications, curtail their volume or shut them off entirely solely because they emphasize a policy of firmness in bargaining of which the Board disapproves.

The importance of review by this Court is emphasized by the circumstance that the censorship imposed by the decision below is not expressed in a form which fixes its limits. On the contrary, an imposed limitation on the free communication of a policy of firmness in bargaining, al-

---

[30] "We hold that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken" [per Kaufman, J., App. A 53; see note 5 *supra*, showing the inappropriateness of the label "take-it-or-leave-it."].

"A company may make a firm, fair offer to the union and may stand by that offer, but the company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness.

". . . What makes these practices unfair is GE's 'widely publicized stance of unbending firmness,' that is, GE's communication to its employees that firmness was one of the company's independent policies" [per Waterman, J., App. A 55].

though expressed in the opinions of the Board and in the opinions of the two judges of the Court of Appeals who made up its majority (note 30 *supra*)[31] is not expressed at all in the order of the Board which the court has enforced.[32] Its scope lies undefined in an order (App. C 258) couched in conventional and uninformative language enjoining the Company from refusing to bargain in good faith.

Prior to the passage of Section 8(c) of the Act, this Court, in a landmark opinion (*Thomas* v. *Collins*, 323 U.S. 516, 532 (1945)), stated:

> "This Court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . .'"

And at 537-38:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect

---

[31] All of these opinions, although to the same general effect, differ in various particulars.

[32] "In view of the general obscurity of what GE is and is not permitted to do, the Company could take little comfort from the majority's assurance that it will be given a full opportunity to show it has made a good faith effort at compliance before it is held in contempt" [per Friendly, J., App. A 75].

"But I am particularly disturbed by the treatment accorded Respondent's communications. . . . In areas such as this bordering on Section 8(c) of the Act and free speech, I believe that the Respondent is entitled to something more by way of clarification than the vague proscription implied in the general bargaining order. But I doubt if the facts and findings indicate what specific limitations can properly be laid down" [per Leedom, Board Opinion, App. C 20].

> to joining or not joining unions are within the First Amendment's guaranty . . . . Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed . . . . *But short of that limit the employer's freedom cannot be impaired.*" (Footnotes omitted, emphasis ours.)

In 1947, Congress enacted Section 8(c). Its passage manifested " . . . a congressional intent to encourage free debate on issues dividing labor and management." *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966). As the Court stated (*ibid.*):

> " . . . [C]ases involving speech are to be considered 'against the background of a profound • • • commitment to the principle that debate • • • should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' New York Times Co. v. Sullivan, 376 U.S. 254 [1964] . . . ."

The principle relied upon in the opinions of a number of Courts of Appeals is in direct conflict with that in the case at bar.[33] In *Coppus Eng'r Corp.* v. *N.L.R.B.*, 240 F.2d 564 (1st Cir. 1957) a company had been held to have violated Section 8(a)(2) of the Act by unlawfully assisting and interfering with the administration of a shop committee which was a labor organization within the meaning of the Act. The Board found the company's president had called

---

[33] See also pp. 21-23 *supra*, wherein the basic conflict between the theory of "freezing" here relied on and the holding of the Fifth Circuit in a case rejecting that theory is discussed.

a meeting of employees shortly after an outside union lost an election at the plant and suggested "they have a permanent grievance committee, if that is what they wanted to call it." This led the Board, the court stated, to conclude that the president's statement resulted in the formation of "a labor organization which was the creature of management at inception, and which functioned in subservience to management after inception, contrary to §8(a)(1) and (2)" (*id.* at 571). The court in setting aside the Board's order said (*id.* at 570-71):

> "It is clear that the finding of an unfair labor practice cannot stand in the face of the First Amendment or of §8(c), if the employer's statement, upon which the finding is based, does not contain some threat of reprisal or force or promise of benefit. National Labor Relations Board v. Corning Glass Works, 1 Cir., 1953, 204 F.2d 422, 35 A.L.R.2d 408."

See also *N.L.R.B.* v. *Colvert Dairy Prods. Co.*, 317 F.2d 44 (1963), where the Tenth Circuit Court of Appeals said (at p. 46):

> "The Act (sec. 8(c)) specifically provides that privileged communications between employer and employee shall not be evidence of an unfair labor practice. To allow the privileged communications to become an instrument of destruction by indirection is to frustrate the right of free speech and the privilege of persuasion."[34]

---

[34] To the same effect *N.L.R.B.* v. *Rockwell Mfg. Co. (DuBois Div.)*, 271 F.2d 109 (3rd Cir. 1959); *N.L.R.B.* v. *Threads, Inc.*, 308 F.2d 1 (4th Cir. 1962); *Southwire Co.* v. *N.L.R.B.*, 383 F.2d 235 (5th Cir. 1967); *Union Carbide Corp.* v. *N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962); *Indiana Metal Prods. Corp.* v. *N.L.R.B.*, 202

Moreover, the decision in the case at bar conflicts with other decisions of the Second Circuit. See *N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967); *N.L.R.B.* v. *Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967).[35]

In the words of the Second Circuit, "when the statute being enforced [e.g., Section 8(c)] approaches the limits of constitutional power . . . . the overriding principle of construction [requires] that [it] be read so as to avoid serious constitutional doubt . . . ." *N.L.R.B.* v. *Golub Corp.*, *supra* at 928.[36]

F.2d 613 (7th Cir. 1953), *cert. denied*, 346 U.S. 856; *Gem Int'l, Inc.* v. *N.L.R.B.*, 321 F.2d 626 (8th Cir. 1963); *N.L.R.B.* v. *Laars Eng'r, Inc.*, 332 F.2d 664 (9th Cir. 1964); *J. S. Dillon & Sons Stores Co., Inc.* v. *N.L.R.B.*, 338 F.2d 395 (10th Cir. 1964); *Amalgamated Clothing Workers* v. *N.L.R.B.*, 365 F.2d 898 (D.C. Cir. 1966); *Truck Drivers Local 728* v. *N.L.R.B.*, 364 F.2d 682 (D.C. Cir. 1966).

[35] The lead opinion offers in support of its unprecedented holding Senator Taft's statement that:

> "'It should be noted that this subsection is limited to "views, arguments or opinions, and does not cover instructions, directions; or other statements that would ordinarily be deemed relevant and admissible in courts of law." 1 Legislative History of the LMRA 1947, at 1541'"

and suggests that "the key word is 'relevant'" (App. A 48). But as the minority opinion correctly points out, "GE's communications fit snugly under the phrase 'views, argument or opinion' in § 8(c)" (App. A 70). Such communications do not fall under the exception which Senator Taft described (App. A 71). Here the Company's expression of its views was held not relevant to *proof* of violation but an *integral part* of the violation itself.

[36] Accordingly, Courts of Appeals for at least six other circuits have regarded it as "well settled" that a "narrow or strained construction" of the free speech provision is to be avoided. *N.L.R.B.* v. *Arkansas Grain Corp.*, 392 F.2d 161, 163-65 (8th Cir. 1968); see also *Coppus Eng'rg Corp.* v. *N.L.R.B.*, *supra* at 570-71; *Trailmobile Div. Pullman, Inc.* v. *N.L.R.B.*, 389 F.2d 195, 196 (5th Cir. 1968); *N.L.R.B.* v. *Mt. Vernon Tel. Corp.*, 352 F.2d 977, 979 (6th Cir. 1965); *Union Carbide Corp.* v. *N.L.R.B.*, *supra* note 34 at 845;

The Second Circuit's decision here also establishes another conflicting principle in this field of the law by creating a vague standard impossible to define and delimit by any objective measure. As stated by this Court in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-33 (1962):

> " . . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant*, 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter ~~their~~ exercise almost as potently as the actual application of sanctions. Cf. *Smith* v. *California, supra*, at 151-154; *Speiser* v. *Randall*, 357 U.S. 513, 526. *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell* v. *Connecticut*, 310 U.S. 296, 311." (Emphasis ours.)[37]

In the words of the dissent below (App. A 74):

> "It is doubtless true in labor as in other negotiations that the louder people shout, the harder it becomes for

---

Indiana Metal Prods. Corp. v. *N.L.R.B., supra* note 34 at 617; *N.L.R.B.* v. *Howard Quarries, Inc.*, 362 F.2d 236, 239-40 (8th Cir. 1966); *Gem. Int'l Inc.* v. *N.L.R.B., supra* note 34 at 629; *N.L.R.B.* v. *Laars Eng'r, Inc., supra* note 34 at 667.

[37] See also, *U. S.* v. *Robel*, 389 U.S. 258, 266-67 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-13, 516 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963); *Winters* v. *New York*, 333 U.S. 507 (1948).

them to change their positions without unacceptable loss of face. In that sense any positive public declaration, whether by an employer or by a union, may run counter to the objective of securing industrial peace by promoting agreement. But the Board has been expressly prohibited from promoting peace by restricting speech. Conformably with the dictates of the First Amendment, Congress, when it enacted §8(c), determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech."

3. The decision below on the personal accident insurance issue conflicts with a decision of this Court interpreting Section 8(d) of the Act and with decisions of the same and another Court of Appeals.

The Company on June 1, 1960, advised the Union by letter that it had completed arrangements for a personal accident insurance group policy under which *all* GE employees desiring to do so could participate, the full cost to be borne by participating employees (App. C 56; G.C. Exh. 3(72)). If the Union had no objection to making the insurance available to employees in its units, it would be made available to them as of July 1, in advance of their 1960 vacations—a period of relatively high outside-of-plant accident frequency. If, however, the Union desired to defer action, the insurance would still be available "at any later time the union desired" (*ibid.*). This insurance was to be *in addition* to that already provided under the existing collective bargaining agreement.

At the time the policy was offered (June 1, 1960), neither the time specified by law (Section 8(d)) nor that

specified in the contract for commencement of negotiations on the subject of insurance had arrived (App. C 57; R. Exh. 1, Section 4 of Title I—quoted in pertinent part at App. A 23 n. 4). Nevertheless, the Union demanded immediate and full negotiations thereon and proceeded to voice its various objections thereto (App. C 57-58).

The Company contested the bargainability of the matter *at that time* but assured the Union that it would not try to embarrass it by making capital of its rejection (App. C 59). The Board's trial examiner found that "GE kept faith" with this promise (App. C 59; see also G.C. Exh. 72(9)).

Although the Company had indicated that negotiations on this subject might become appropriate during the forthcoming general negotiations, the Union never raised the subject again (App. C 59).

Relying entirely on its decision in *Equitable Life Insurance Co.*, 133 NLRB 1675 (1961)—which had never previously been subjected to court review—the Board by a vote of 3-2 found that the foregoing facts constituted a *per se* violation of Section 8(a)(5) of the Act. The two dissenting Board members here relied on the reasoning of the dissent in *Equitable*—also decided by a 3-2 margin. The Board majority also used the personal accident insurance incident to support its finding of overall bad faith here.

The majority below upheld the Board on this issue (App. A 18-25) and relied heavily on it, as did the Board (App. C 8), for the conclusion of overall lack of good faith. Accordingly, as observed by the dissenting judge (App. A 59):

> "If this conclusion is wrong, as I think it to be, such an important element is removed from the 'totality of the circumstances' on which the Board relied that, on this ground alone, we could not properly enforce the order as to the overall bad faith." [38]

The majority's reliance (App. A 24) on this Court's decision in *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962), is clearly misplaced (see App. A 60). For there *during a period of bargaining* the employer *made three unilateral changes* in terms and conditions of employment, while here the Company merely *submitted a proposal* to the Union and did this *at a time when it had no duty to bargain at all.*

The decision below, we submit, is inconsistent in principle with the unanimous decision in another recent case of the same Court of Appeals, namely, *General Electric Co.* v. *N.L.R.B.*, 412 F.2d 512 (2d Cir. 1969). There the court expressly rejected the proposition that "anything that would be improper in the mandatory bargaining period must be so regarded at the earlier time . . . ." 412 F.2d at 521. It noted that conduct considered illegal during the mandatory bargaining period may be completely permissible before the bargaining period begins, and concluded (*ibid.*):

---

[38] The inclusion of the personal accident insurance incident as part of the totality of circumstances showing bad faith was in itself incorrect, regardless of the correctness of the holding of independent violation. The incident was completely isolated from and unrelated to the events of the forthcoming negotiations. Moreover, based on the contract waiver and the state of the law at that time (*Equitable* was not decided until the following year), GE was at least reasonably justified in concluding on June 13, 1960, that its insurance proposal was not then a bargainable matter.

"The real point is that there is a difference between the two periods and that distinctions which are the stuff of the law, are called for."

The decision below also conflicts with this Court's own view of Section 8(d) of the Act in *N.L.R.B.* v. *Lion Oil Co.*, 352 U.S. 282 (1957). To hold, as it did, that the Union can require the Company to bargain about its personal accident insurance proposal is to say that the Union has a right to strike to support its demands with respect to that proposal. Giving a Union this right undermines and defeats the purposes of Section 8(d) of the Act insofar as that section was designed to prevent strikes during a contract's term.[39] This Court in *Lion Oil Co.* read Section 8(d) as forbidding strikes to enforce contract demands prior to the reopening or termination date of the contract.

It also conflicts with the decision of the Court of Appeals for the Ninth Circuit which held that a refusal during contract term to bargain on a matter removed from the scope of bargaining during that period does not violate Sections 8(a)(5) or 8(a)(1) of the Act. *N.L.R.B.* v. *Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967).

The decision below if permitted to stand would discourage that freedom of discussion and suggestion during contract term and that freedom to offer new benefits, which in many cases have resulted in improved labor relations. It raises an important question of federal law on which an authoritative ruling of this Court would both end the conflicts described above and settle a matter of substantial import to the labor-management community.

---

[39] See App. A 61; *Equitable Life Insurance Co., supra* (dissenting opinion).

4. The decision below raises a significant question of federal law which has not been, but should be, settled concerning the duty to furnish a union with estimates of the future costs of proposals made by an employer during collective bargaining negotiations.

This petition seeks review of the finding below of violation of Section 8(a)(5) of the Act for failure to furnish certain information comprising estimates of the future costs per employee of the insurance and pension benefits proposed by the Company during bargaining (see items A and B of September 22, 1960 letter, G.C. Exh. 3(40), quoted in full at App. A 29 n. 8).

It should be emphasized, that these were not "information" in the ordinarily accepted sense, but, rather, *predictions* or *estimates* as to the cost of still unaccepted Company proposals. Neither the duty to supply this type of information nor its relevancy to collective bargaining negotiations has been recognized by this Court.[40]

The view which the court below took of the duty to provide information during bargaining was not confined to the finding of *per se* violation on which certiorari is hereby

---

[40] In *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), on which the court below relies, this Court carefully limited its holding so as to permit a union substantiating data only where the employer mechanically repeats an argument of inability to pay during bargaining. This Court cautioned that even there the duty to furnish data would not "automatically" follow, but would depend on the "circumstances of the particular case" (*id.* at 153-54).

It is undeniable in this case that GE did not resist Union demands by offering an argument of inability to pay. In fact, the Company declared in response to the Union's September 22 request for cost data that such data was speculative in nature, not relevant to the bargaining and that the Company was *"ready to pay whatever is necessary to implement the proposals we are putting on the table"* (G.C. Exh. 3(45), emphasis ours).

sought. It appears also from the court's observation—not based on any finding to this effect by the Labor Board—that bad faith could be inferred if an employer refused "to estimate not only the cost of components of its offer, but the total size of the wage-benefit package it would consider reasonable" (App. A 42).

Both the precise *per se* holding on the issue under discussion and the court's all but limitless assessment of the gauge of the duty to provide cost estimates at the penalty of being held in bad faith underscore, we submit, the importance of the question hereby raised and the desirability of its review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

David L. Benetar
Nordlinger, Riegelman, Benetar & Charney
420 Lexington Avenue
New York, New York 10017
Counsel for Petitioner

Robert C. Isaacs
Michael I. Bernstein
Stanley Schair
Of Counsel

January 12, 1970

APPENDIX A

Opinions of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 337, 338—September Term, 1968.

(Argued June 3, 1969 Decided October 28, 1969.)

Docket Nos. 29502, 29576

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

GENERAL ELECTRIC COMPANY,

Respondent,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Intervenor.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Petitions to review and to enforce order of the National Labor Relations Board based on findings of unfair labor practices and failure to bargain in good faith in violation

of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), (5). Order enforced.

EUGENE B. GRANOF, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Warren M. Davison, Eugene B. Granof, National Labor Relations Board, on the brief), *for petitioner.*

DAVID L. BENETAR, New York, N. Y. (David L. Benetar, Robert C. Isaacs, Michael I. Bernstein, Stanley Schair, Nordlinger, Riegelman, Benetar & Charney, New York, N. Y., on the brief), *for respondent.*

RUTH WEYAND, Washington, D. C. (Irving Abramson, Washington, D. C., on the brief), *for intervenor.*

KAUFMAN, *Circuit Judge:*

Almost ten years after the events that gave rise to this controversy, we are called upon to determine whether an employer may be guilty of bad faith bargaining, though he reaches an agreement with the union, albeit on the company's terms. We must also decide if the company committed three specific violations of the duty to bargain by failing to furnish information requested by the union, by attempting to deal separately with IUE locals, and by presenting a personal accident insurance program on a take-it-or-leave-it basis.

I.

The Prior Proceedings

In the wake of what it regarded as unsatisfactory negotiations with the General Electric Company (GE) during the summer and fall of 1960, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE) filed unfair labor practice charges with the National Labor Relations Board. The General Counsel, on April 12, 1961, filed a complaint alleging that GE had committed unfair labor practices in violation of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), 158(a)(3), and 158(a)(5) (1964). Hearings were held before a trial examiner between July, 1961, and January, 1963, and included testimony, oral argument, and submission of briefs. The Trial Examiner issued his Intermediate Report on April 1, 1963, which found GE guilty of several unfair labor practices. GE and the IUE filed exceptions to the Intermediate Report, and on December 16, 1964, the NLRB agreed with the Trial Examiner. 150 N.L.R.B. 192 (1964).

There followed the race to the courthouse that is an unhappy feature too often encountered in these matters. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542, 598-600 (1969). Since GE does business in every state, every court of appeals has jurisdiction, if GE's petition for review is first filed there. See 29 U.S.C. §160(f) (1964); 28 U.S.C. §2112 (1964). The IUE claimed that it filed in the District of Columbia Circuit 14 seconds before GE handed its petition to the clerk in

the Seventh Circuit. GE's version of course differed. The NLRB, admitting its confusion (not without reason, it would seem), suggested that since the question of timing was incapable of rational solution, the Second Circuit, where the unfair labor practices complained of occurred, would be the logical place to begin. The District of Columbia and Seventh Circuits agreed. *IUE* v. *NLRB,* 343 F. 2d 327 (D.C. Cir. 1965); *GE* v. *NLRB,* 58 LRRM 2694 (7th Cir. 1965). Another year was required to determine that the Union's proper status in the action was that of intervenor. *NLRB* v. *General Electric Co.,* 59 LRRM 2094, 2095 (2d Cir. 1965), *vacated and remanded, IUE* v. *NLRB,* 382 U.S. 366 (1966), *modified on remand, NLRB* v. *General Electric Co.,* 358 F. 2d 292 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966). See *International Union, Local 283* v. *Scofield,* 332 U.S. 205 (1965).

In order for the action to reach its present state of ripeness, this court consolidated GE's petition for review (No. 29576) with the Board's petition for enforcement (No. 29502). *NLRB* v. *General Electric Co.,* 358 F. 2d 292 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 (1966). Another year and a half passed while the parties attempted to settle the case without recourse to further litigation. When a satisfactory settlement proved too elusive, they reentered the fray with renewed vigor, undiminished by the passage of time, two successive collective bargaining contracts (1963 and 1966), and by another suit over proper representation arising out of the 1966 negotiations. *McLeod* v. *General Electric Co.,* 257 F. Supp. 690 (S.D.N.Y.), rev'd 366 F. 2d 847 (2d Cir. 1966), remanded 385 U.S. 533 (1967). See also *General Electric Co.* v. *NLRB,* No. 32867 (2d Cir., June 9, 1969).

II.

The Bargaining Background

General Electric, a New York corporation, is the largest and perhaps best known manufacturer of electrical equipment, appliances, and the like. Its products—manufactured in all the 50 states—range from refrigerators to atomic energy plants, from submarines to light bulbs. In 1960, it employed about 250,000 men and women; of these only 120,000 were unionized. The IUE is an international union, affiliated with the AFL-CIO, and had a total membership of about 300,000. In 1960 it represented some 70,000 of the 120,000 unionized GE employees, formally grouped in more than 105 bargaining units, and was far and away the largest single union with whom GE dealt. The next largest, the United Electrical Workers (UE), represented only 10,000 members, and the remaining 50,000 unionized employees were split among some 100-odd other unions or bargaining agents who dealt independently with GE. A high proportion of GE employees are supervisory or managerial personnel, who are available to the company in the event of a strike.

The present action has its roots deep in the history of prior negotiations and bargaining relationships. Before 1950, the major union was the UE. In 1946, negotiations reached an impasse and resulted in a serious and crippling strike. GE eventually capitulated, and agreed to a settlement that it later characterized as a "debacle," and beyond the company's ability to meet.

GE's response came in the form of a new approach to employee relations, urged by one of its vice presidents, Lemuel R. Boulware. Although GE generally objects to use of the term, describing it as a "hostile label," the tactic

of "Boulwareism" associated with his name soon became the hallmark of the company's entire attitude towards its employees.[1]

In many respects, GE's negotiating policy after the 1946 strike followed a predictable course. The Company had been concerned over the antipathy many of the employees displayed during the strike. It decided that it was no longer enough to act in a manner that it thought becoming for a "good" employer; it had to insure that the employees recognized and appreciated the Company's efforts in their behalf. The problem was perceived as a failure to apply GE's highly successful consumer product merchandising techniques to the employment relations field.

The new plan was threefold. GE began by soliciting comments from its local management personnel on the desires of the work force, and the type and level of benefits that they expected. These were then translated into specific proposals, and their cost and effectiveness researched, in order to formulate a "product" that would be attractive to the employees, and within the Company's means. The last step was the most important, most innovative, and most often criticized. GE took its "product"—now a series of fully-formed bargaining proposals—and "sold" it to its employees and the general public. Through a veritable avalanche of publicity, reaching awesome proportions prior

---

1 Commentators are almost as widely split on the spelling of the term as they are over its merits. See, e.g., H. R. Northrup, *Boulwarism* (1964); Note, *Boulwareism: Legality and Effect*, 76 Harv. L. Rev. 807 (1963); Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 Rutgers L. Rev. 653 (1966); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 Corn. L. Rev. 1009, 1025 (1968) ("Boulwarism"). We will follow the trial examiner in denominating the technique as "Boulwareism."

GE, while abjuring the use of the term Boulwareism, described its bargaining tactic in the early days as "the Boulware approach" in speeches to its supervisors.

to and during negotiations, GE sought to tell its side of the issues to its employees. It described its proposals as a "fair, firm offer," characteristic of its desire to "do right voluntarily," without the need for any union pressure or strike. In negotiations, GE announced that it would have nothing to do with the "blood-and-threat-and-thunder" approach, in which each side presented patently unreasonable demands, and finally chose a middle ground that both knew would be the probable outcome even before the beginning of the bargaining. The Company believed that such tactics diminished the company's credibility in the eyes of its employees, and at the same time appeared to give the union credit for wringing from the Company what it had been willing to offer all along. Henceforth GE would hold nothing back when it made its offer to the Union; it would take all the facts into consideration, and make that offer it thought right under all the circumstances. Though willing to accept Union suggestions based on facts the Company might have overlooked, once the basic outlines of the proposal had been set, the mere fact that the Union disagreed would be no ground for change. When GE said firm, it meant firm, and it denounced the traditional give and take of the so-called auction bargaining as "flea bitten eastern type of cunning and dishonest but pointless haggling."

To bring its position home to its employees, GE utilized a vast network of plant newspapers, bulletins, letters, television and radio announcements, and personal contacts through management personnel.

Side by side with its policies of "doing right voluntarily" through a "firm, fair offer," GE also pursued a policy of guaranteeing uniformity among unions, and between union and non-union employees. Thus all unions received substantially the same offer, and unrepresented employees

were assured that they would gain nothing through representation that they would not have had in any case. Prior to 1960, GE held up its proposed benefits for unrepresented employees until the unions agreed, or until the old contract with the Union expired.

The IUE split off from the UE in 1950, when the UE was expelled from the CIO for alleged Communist domination. Since 1950, the IUE and GE have bargained on a multi-unit basis, despite the presence of separate unit certifications for IUE locals. The pattern was continued in successive 1951, 1952, 1954, and 1955 renewal contracts. In practice, the IUE has dealt with the company through its General Electric Conference Board, composed of delegates elected from IUE locals. Under the Union constitution, the Conference Board may call strikes, make contract proposals, and conclude agreements, regardless of an individual local's consent. GE has dealt with, and recognized the status of, the Conference Board since 1950, although the national agreements frequently provided that some matters, usually minor, would be left to local agreement.

The 1955 Contract, which was to run for five years, contained a provision allowing the Union to reopen in 1958, solely on the issue of employment security. The union did so, but was unable either to gain concessions from the Company, or to elicit enough support for a strike.

III.

The 1960 Negotiations

Under the 1955 Contract, the earliest date that either party could compel the beginning of negotiations was August 16, 1960, 45 days before the end of the contract.

Both sides, however, were anxious to take at least some preliminary steps before they were required to.

The IUE set up a loose alliance with several other AFL-CIO unions who bargained with GE, and they jointly polled their members on proposals. Before the actual beginning of formal negotiations, the IUE also began preparing its members through information about some of the possible demands that appeared likely to be presented to GE.

Since the linchpin of the "Boulware approach" was to bring GE's side of the story home to its employees and to the general public, it began in the latter part of 1959 to advise its Employment Relations Managers of the subjects that they should be prepared to discuss with employees. This was effected through various media, including plant publications and personal contact. General arguments in favor of keeping GE competitive through low costs, and the advantage of receiving GE benefits without having to wait for Union officials to approve them, were among the suggestions presented.

Informal meetings were first held in January, 1960, and Union and Company subsequently joined in preparing a body of information. Neither side felt any inclination to complain of want of cooperation at this stage. GE, in fact, took pains to suggest alternate information when the precise form the Union desired was unavailable.

Before another planned informal meeting in June, 1960, GE notified the IUE by letter that as of July it would institute a contributory group accident and life insurance plan for all employees, but if the Union objected, only unrepresented employees would receive the benefits. The Union protested that the Company had to bargain before making such a unilateral change, but GE insisted that the 1955 IUE-GE Pension and Insurance agreement waived

all such requirements. The Union still objected, and the program was put into effect only for unrepresented employees.

At the June meeting, the Union stated its proposals, as they then stood. Without much discussion, other than some minor clarifications, Philip D. Moore, GE's Union Relations Service Manager and chief negotiator, called the proposals "astronomical" in cost, "ridiculous," and not designed for early settlement.

Following the presentation of these proposals, the early publicity phase of the Boulware approach swung into high gear. Employing virtually all media, from television and radio, to newspaper, plant publications and personal contact, the Company urged employees and the public to regard the Union demands as "astronomical" (then and later a favored Company term), and likely to cost many GE employees their jobs through increased foreign competition. GE, on the other hand, announced it would in time make a fair and "firm" offer that would give employees no reason to allow union leadership to impose a strike. The basic theme was that the Company, and not the Union, was the best guardian and protector of the employees' interests.

The IUE also tried its hand at publicity, including an "IUE Caravan" that travelled from city to city, and occasional articles in the International Union's newspaper. In scope and effectiveness, however, they were far outshadowed by the Company's massive campaign.

From July 19 to August 11, the Union presented its specific proposals on employment security, to which the Company replied with general expressions of disapproval, or simply rejected. GE spent the next five meetings delivering prepared presentations on the general causes of eco-

nomic instability, which the Union branded as a waste of time.

In subsequent meetings, the Company's posture remained unchanged. It would comment generally on some Union demands, and consider them in formulating its offer, but would not commit itself in any way. While it complained that the IUE proposals were excessive, it replied to Union requests for cost estimates with "we talk about the level of benefits," or that the proposals cost "a lot." GE would not indicate the total cost of a settlement it considered reasonable ("we talk level of benefits"); the Union in turn refused to rank its demands by priority, describing them all as "musts." Indeed the entire early period—and the later negotiations as well—were characterized by an air of rancor on both sides, which provided each with welcome opportunities to downgrade the other in communications to Union members.

GE finally revealed its own proposal informally on August 29. While expressing distress at some features of the offer, Union negotiators urged the Company to delay publicizing its "firm, fair" offer, so that its position would not be frozen before the IUE had an opportunity to examine it and offer changes. GE refused, agreeing only to hold up most of the prepared and packaged publicity until after formal presentation of the offer on the next day.

Union officials frequently renewed their requests for cost information during the ensuing month of negotiations. GE consistently refused to estimate the cost of its proposal or of any of its elements, so that the Union might reallocate its demands. When pressed for some of the highly-touted GE cost studies, Moore frequently slipped into the "level of benefits" format, and generally showed no interest in presenting alternate information that was available and would have served the Union's needs.

There were few modifications made in the original GE offer. The Company did propose an extra week's vacation after 25 years in exchange for a smaller wage increase; but Union officials had indicated at the outset that they were uninterested in paring down what they considered an already inadequate wage offer. Despite this, and in the face of the departure by Union officials for their national conference, GE publicized the "new" offer heavily in employee communications.

After declaring late in September that the "whole offer" was "on the table," GE contrary to prior practice, brought its position home by making its three per cent wage increase offer effective for unrepresented employees before the end of the contract or IUE acceptance. Two days later GE also put its pension and insurance proposals into effect, despite IUE President James Carey's complaint that this would "inhibit" any subsequent modifications.

On September 21, Federal Mediation Service officials began to sit in on the negotiations at the request of the Union. Their presence does not appear to have measurably aided the negotiations. The Union, in response to Company complaints that the IUE proposals were too costly, submitted a written request for information on the cost per employee of the GE pension and insurance plans, as well as the number of employees who could be expected to benefit from GE's vacation and income extension proposals. The request was refused in part, and the remainder was not complied with until after the strike, when the information would be of no substantial value to the Union.

Similar difficulties confronted the Union in its efforts to change the effective date of the pension and insurance plans. The Company proposed a January 1 date for the first increase in pension and insurance benefits; the Union in turn suggested that the increase in benefits should coin-

cide with the beginning of the contract. GE shifted its ground back and forth: first it claimed that the earlier date would be too costly; then it said that it was talking "level of benefits" and not cost; then it argued that prior contracts had always provided for pension increases on the first of the year. When this last ground proved to be incorrect, one GE negotiator promised to "consider" the October date, although he insisted the January date was "appropriate." During that afternoon, however, even this concession was withdrawn, and later explanations included describing January again as "appropriate," and "the time that you make all the resolutions for the New Year." [2]

---

2 Without trying to follow the issue through all its permutations, some of the relevant portions of the negotiating minutes went as follows:

(September 21, 1960)

Carey (Union): . . . You change the dates of our proposal just so you wouldn't give us what we wanted.

• • • • •

. . . make the effective date of the Pension Plan October 2nd instead of January 1st.

Willis (Company): January 1, 1961 is all right.

Callahan (Union): You can do better than that.

• • • • •

Willis: Talk to Mr. Moore.

• • • • •

(Later that day)

Moore (Company): I know you did. You would like to have it October, 1960, and we feel it should be January 1, 1961 along with the other changes.

Fitzmaurice (Union): We have people who are going to retire between October and January. They feel that they are out in limbo.

Moore: This would apply to many people any time you set a date a particular date.

Callahan: Didn't the five-year agreement on pensions extend from the time of the agreement and not January? [The 1955 pension agreement began by the date of the overall 1955 agreement.]

• • • • •

(*continued on following page*)

Union officials complained that "it is just because we request something that you would refuse to give it," and subsequent Company explanations served to support,

---

(September 22, 1966)

Carey: Could you bring in for the conciliators the difference in terms of the cost between what we are proposing and what you want. You know—the cost of making the effective dates different.

* * * * *

. . . . We are asking you to determine the costs of making the effective dates that we suggest and the difference in yours.

Moore: Mr. Carey, we are talking level of benefits. You know that. We don't talk cost. We talk level of benefits.

* * * * * *

Willis: It is the appropriate date, Mr. Carey.

Lasser (Union): Is this your idea of collective bargaining that you listen to us and then you come to a conclusion and that is it.

Hilbert (Company): No, Dave, you know that. Unless you have something to convince us differently.

Lasser: Why that date? Why April 1962? [April was the date the Company preferred to have the second step-up in pension benefits.]

Willis: The wage structure will come up at that time and it will be changed at that time, that is why.

Carey: Wait a minute, wait a minute, wages will go up October 1, 1961. Let us make the agreement that the date the wages go in—that is the date the wages go in, the pensions go in effect at that date.

Hilbert: Let's wait and see what happens on wages—it won't be October, 1961.

Carey: All right—let's leave it on that basis. If it is based on the wage structures we can conform to those dates.

Hilbert: We can consider it.

* * * * *

Carey: We would like to proceed to arrive at an agreement on insurance, vacations and holidays like we did on pensions. I think we have an agreement on that if Management would change the date of the pensions to the date of the wage levels, now that they said that Mr. Hilbert would consider.

Moore: Mr. Carey, we aren't taking anything under advisement for later consideration.

Carey: A Management representative said that they would take it under advisement for later consideration. Sid and Hilbert did. I think you ought to leave them alone and go on to your assignment, Mr. Moore. Maybe we can get an agreement.

(*continued on following page*)

rather than to undercut, this feeling. On September 28, with three scheduled meetings left before the end of the contract, a Union negotiator, seeking to salvage something of the earlier IUE Supplemental Unemployment Benefits proposal, suggested a local option plan under which some of the funds the Company had allocated to wage increases and its income extension offer could be diverted to supplement unemployment compensation. He was clear that nothing was to be added to the Company's costs. Moore responded, "After all our month of bargaining and after

---

Moore: Do we have that cleared up? We have nothing under advisement, Mr. Carey.

Carey: What are these fellows doing here. They said they would take it under advisement.

Moore: We aren't taking anything under advisement, Mr. Carey. It is all on the table.

Carey: Can we get an agreement on a tentative basis like we did on pensions?

Moore: We have got everything there is on the table. We have all five items in the proposal. They are on the table.

* * * * *

On September 27, 1960, the Union raised the question of pension dates again:

Stanley (Union): I was here. Last week you said you were basing your pension date on the date that wages were made effective which was April, 1962 and if it changed you would consider.

Hilbert: Let's take first things first, Mr. Stanley.

Sigal (Union): How about the first part of the pensions and their effective date? Why aren't the pension changes effective on that date? The 1st of October, 1960.

Willis: We did make them effective the first part. We made the increase of $2.25 to $2.40 effective on January 1st.

Sigal: Where does the April, 1962 date come from?

Willis: It's the mid-point of the contract.

Sigal: If it is status that counts, what does January 1, 1961 have to do with it? That isn't the mid-point of the first part.

Hilbert: You know it's the beginning of the year and it's the time that you make all the resolutions for New Years and all that.

Sigal: You mean all the things that you break, is that it? If you are talking about contract dates it should be October 1, 1960.

Willis: We think it is an appropriate date, Mr. Sigal.

telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no." A few moments later Moore reiterated his belief that "we would look ridiculous if we changed it." Hilbert, for GE, later gave three reasons why the Company would not consider the proposal—and two of them were that it would make GE "look foolish in the eyes of employees and others . . . ."

GE on September 29 rejected a Union offer to maintain the status quo under the old contract until a new one was signed, specifically refusing the cost-of-living escalator clause, and stating that it would "consider" later Union-related terms such as dues checkoff. A strike (which took place on October 2, except for the Schenectady Local, which joined October 6) was clearly imminent. Although claiming to be uncertain about truce terms with national IUE negotiators, GE headquarters on September 29 authorized its Schenectady Employee Relations Manager, Stevens, to offer all the pre-existing terms of the contract (except for the cost-of-living term) to the local. Stevens did so in statements to Union members and to the local Business Agent, Jandreau. A similar offer was made to the Pittsfield local, and broadly publicized there.

By October 10, the Company (after the Union had filed an unfair labor practice charge) made the same offer to the Union's national negotiators, for any locals that returned to work. Despite rejection by the Union at the national level, the Company proceeded to deal directly with local officials, and to urge acceptance of the offer. When local officials demurred, as, for example, at Lynn, Massachusetts, publicity was aimed at the employees themselves, criticizing the local officials' stand on the "truce." Similar events occurred at Waterford, Louisville, Bridgeville, and Syracuse.

Throughout the course of the strike, GE communications to the employees emphasized the personal character of the Union leaders' conduct, and threatened loss of jobs to plants that returned to work late. Negotiations were held during the strike until October 19, when the Company declared that an impasse had been reached. During that period, GE refused to give the IUE definitive contract language until the Union had chosen which of the options it preferred, and until it gave its unqualified approval of the Company proposal.

On October 21, it became clear that Union capitulation was near. The Company, which had previously refused to delete the retraining provision from its offer, felt free to relax its position, and granted the Union's request to permit a local option on retraining. While refusing a joint strike settlement agreement, which both parties would sign, GE did propose a unilateral "letter of intent," indicating that it was in agreement with most of the Union settlement proposals. On October 22, the Union capitulated completely, signing a short form memorandum agreement (they had not yet seen the complete contract language to which they were agreeing), and the Company alone issued its letter of intent. The strike ended on October 24.

Two matters were left open for settlement: seniority for transferred employees, and dues checkoffs. Neither, when finally settled, represented more than an adjustment to take account of NLRB decisions that rendered the original form of the agreement of dubious legality. Some minor changes also followed, none of any considerable significance.

The only other events of importance occurred at the Augusta, Georgia plant. On October 5, the plant manager sent a letter to the four employees on strike (at that time the only ones), warning them that their employment would

be terminated and replacements hired if they did not return to work. On October 13, however, he sent them telegrams, retracting the earlier letter as to job termination, but indicating the replacements would be hired. More employees (twenty in all) joined the strike after October 5, and on October 24 the Company refused their unconditional offer to return to work. It did, however, give physical examinations to three of the employees, and rehired the two who passed.

IV.

The Specific Unfair Labor Practices

A. *Unilateral Insurance Proposal*

On June 1, 1960, before the reopening of negotiations, but after GE had agreed to meet with the Union on June 13 to hear its proposals, the Company notified the Union by letter that it would unilaterally institute a personal accident insurance proposal. Under the Company plan, the insurance would go into effect on July 1, would be paid wholly by the employees, and would be in addition to existing insurance coverage provided by GE. If the IUE objected, GE would not offer the insurance to its members; it would, however, make it available to other employees regardless of the stand taken by the IUE.

Prior to the June 13 meeting, GE publicized the new insurance proposal, along with the information that enrollment would take place later in the month. At the meeting, the Union objected strenuously to GE's failure to bargain over the insurance, claiming that it was clearly a bargainable issue, which GE had a duty to discuss with Union representatives.

Ordinarily, the matter would be relatively simple; it appears well settled that insurance is a mandatory subject for collective bargaining, and the employer violates section 8(a)(5) of the National Labor Relations Act by refusing to bargain over it. See *NLRB* v. *General Motors Corp.*, 179 F. 2d 221 (2d Cir. 1950); *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (dictum). He would, of course, also violate the Act if he unilaterally changed the conditions or terms of employment. See *NLRB* v. *Katz*, 369 U.S. 736 (1962). Here, however, both the policy of section 8(d) of the Act, and the 1955 IUE-GE Pension and Insurance Agreement (which was to remain in force until October 1, 1960) affect the issue, although it is correct that section 8(d) is not by its terms applicable. Section 8(d) provides that during the term of a collective bargaining agreement neither party need:

> ". . . discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. §158 (d) (1964).

Under the 1955-1960 Pension and Insurance Agreement, each party waived the right to require the other to bargain as to pensions or insurance matters except during the stated renegotiation period—which, barring waiver, was months off.

Read expansively, and without any attention to the purpose of the section, the combination of 8(d) and the Pension Agreement might appear to protect any action that GE might take with respect to insurance during the term

of the agreement. In *Equitable Life Insurance Co.*, 133 N.L.R.B. 1675 (1961), however, the Board took the view that that 8(d) was designed to protect the status quo; it was to be used as a shield, not as a sword.

To support this view, the Board now urges that the legislative history demonstrates that the primary purpose to be served by the relevant portion of 8(d) was to achieve "peaceful industrial relations" through stable collective bargaining agreements which guard "the right of either party to a contract to hold firm to the terms or conditions of employment specifically provided for in writing." 133 N.L.R.B. at 1689. See II Legislative History, LMRA 1947, at 1625.[3] See also *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (2d Cir. 1952). Indeed, a convincing *reductio ad absurdum* argument can be made that any other reading would construe 8(d) and the contract provision as permitting GE to make any modifications in the insurance terms that it sees fit—for example to increase or decrease its contribution to the existing policy—all without any consultation with or recourse for the Union. Section 8(d), the argument would run, covers "any modification," which would include a decrease in benefits. Such a construction is patently unsupportable; it would simply destroy the stability of the agreement that 8(d) is designed to protect. Moreover, viewing this as a matter of contractual interpretation, it seems highly unlikely that the Union would have ever considered such a clause.

An argument more reasonable superficially is that the Company might add to the agreement through unilateral

---

3 "It [section 8(d)] merely provides that either party to a contract may refuse to change its terms or discuss such a change to take effect during the life thereof without being guilty of an unfair labor practice." II Legislative History of the Labor Management Relations Act (Taft-Hartley Act) 1947, at 1625 (remarks of Senator Taft).

action, but could not subtract from it. In a sense, of course, the difference is illusory. A collective bargaining agreement is a compromise not only between the parties, but of their past, present, and future goals. An insurance agreement that covers particular risks, in a specified way, impliedly rejects other risks, and other methods. Specifically, a Union may always oppose insurance plans to which its employees contribute, believing that the tax benefits of non-contributory plans to its members—and often to the company—in the long run will outweigh any present gains. Or, it may believe that it is important to keep insurance benefits within narrow bounds, so that at the next negotiating session it will be able to press more vigorously for other benefits. In this sense, then, even "additions" to the insurance agreement subtract from the basic compromise that the agreement represents.

Yet even if we were to ignore this threshold difficulty, there are serious objections to permitting one party to an agreement unilaterally to hold out this type of inducement to the other. It creates divisive tensions within the Union; employees with hazardous occupations will favor the proposal, while those with routine tasks will object. Whichever way the Union moves, it loses ground with some part of its constituency. Union democracy is not furthered by permitting the Company to pick the Union apart piece by piece. The same point may be made where there are both union and non-union employees. If the Union refuses the benefit, then it may appear, at least in the short run, to have disadvantaged its members vis-à-vis non-members. Thus it may be forced to sacrifice long-term goals to avoid short-term dissatisfaction.

In the context of this case, where the Company's tactics seemed so clearly designed to show the employees that the

Union could win them nothing more than the Company was prepared to offer, it is even more apparent that a unilateral offer—over which the Union may not bargain—diminishes the rewards and the importance of the bargaining at the end of the contract period. Thus the Union's ability to function as a bargaining representative is seriously impaired. Indeed, such conduct amounts to a declaration on the part of the Company that not only the Union, but the process of collective bargaining itself may be dispensed with. Cf. *Equitable Life Ins. Co.*, 133 N.L.R.B. 1675, 1693 (1961).

A far more subtle argument on behalf of the Company concentrates on the effect the *Equitable* rule has on non-Union employees. This line of thought suggests that the employer can always grant unilateral benefits to non-Union employees. If he were forbidden to do so whenever some of the employees chose a Union as their bargaining representative, then the Union would in effect have the ability to prevent non-Union employees from making an independent choice on benefits. In fact, the argument goes, he would be denying the unrepresented employees their right to refuse to be represented by the Union, and would thus be committing an unfair labor practice. See §7, 29 U.S.C. §157 (1964) ("Employees . . . shall also have the right to refrain from any or all of such activities . . . ."); §8(a)(1), 29 U.S.C. §158(a)(1) (1964) (making violations of §7 an unfair labor practice).

There are two answers to this argument. Section 8(a)(3), 29 U.S.C. §158(a)(3) (1964), forbids discrimination in terms of employment that discourage or encourage union membership. Were GE unilaterally to give only non-Union employees a cash bonus, it would be violating the policy of section 8(a)(3), if its aim were to disparage

the Union. Under some circumstances, in fact, its subjective state of mind would be wholly irrelevant. See Note, *Labor Law—The Decreasing Importance of Employer Motivation as an Element of Unfair Labor Practice,* 46 North Carolina L. Rev. 975 (1968). Hence it is not by any means clear that an employer may give benefits to non-union employees whenever he wishes; his freedom, and that of the non-union employees, is limited by section 8(a)(3).

Moreover, *Equitable* hardly says that an employer like GE may not offer to increase benefits during the term of the contract; rather, its thrust is that if an employer wishes to do so, he must be prepared to bargain with the union. The Act can hardly be read to require less.

GE attempts to distinguish *Equitable* by urging that only section 8(d) and not a contract provision was at stake in that case, and the employer attempted to capitalize on the dilemma it created for the union. The first ground is unconvincing. GE does not direct us to circumstances indicating a desire by the parties to the collective bargain agreement to do more than invoke the protections of section 8(d). Indeed, the Company described the contract language as "the standard 8(d) clause." [4]

---

4 Title 1, Section 4 of the IUE-GE 1955 Pension and Insurance Agreement provided in part:

> ". . . each of the parties voluntarily and unqualifiedly hereby waives any and all rights to require that the other party or parties hereto bargain collectively during the term of this Agreement, with respect to any such subjects or matters whether or not such matters are covered by this Agreement . . . .
>
> The Union and Locals agree that, during the term of this Agreement, there shall be no strike, slowdown, sitdown, or other form of stoppage of work arising out of or conducted in connection with any effort to induce modifications of or amendments or additions to the insurance and pension benefits provided for by this agreement . . . ."

Despite the extremely broad language of the first paragraph, the language of the second—"to induce modifications of or amendments or

Although the Trial Examiner found that GE did not attempt to capitalize on the IUE's refusal to accept the personal accident insurance proposal, this case is not distinguishable from *Equitable*. The employer's attempt to use the Union's plight to its own advantage was not a determinative factor there. The dilemma created by an employer exists whether he uses it crudely or subtly; it is inherent in a take-it-or-leave-it bargaining approach. True, GE did not capitalize on the Union's refusal; but through its enrollment program late in June, and by the unavoidable controversy that the issue itself raised in Union ranks, the Company was able to profit from the situation without exploiting it outright. The rationale of the Board's *Equitable* rule reaches at least that far. Once it is clear that the party who disrupts the status quo cannot rely on section 8(d) to protect his conduct, then unilateral action over a mandatory matter, joined to a refusal to bargain, represents a straightforward rejection of the collective bargaining principle in fact. See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962).

Lastly, GE urges that since the *Equitable* decision was not filed until 1961, it should be found blameless, since it did not know that its conduct was proscribed.[5] Of course,

---

additions to the insurance agreement"—seems rather clearly to indicate that this clause, like section 8(d), was for the benefit of the party attempting to maintain the status quo, and not the party seeking to unsettle it.

The NLRB may interpret such a contract during the course of an unfair labor practice hearing, where the question is whether the union waived a statutory safeguard. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967).

5 GE cites *Columbine Beverage Company*, 138 N.L.R.B. 1297 (1962), for the proposition that it might avoid an unfair labor practice finding by relying on a pre-existing NLRB ruling. In *Columbine* an employer refused to bargain with a unit at a time when the NLRB considered the unit appropriate. After the union filed unfair labor practice charges,

it is also true that the conduct, although not yet proscribed, had not been judged proper either, and indeed, Equitable Life Insurance Company itself stands on the same footing with GE in that respect. In any event, parties who make a practice of stretching the statutory fabric to the breaking point should not be surprised when the cloth gives way. Cf. *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 620 (1969) (condemning "brinkmanship").

B. *Refusal to Furnish Information*

It is conceded that in the prenegotiation period GE was quite cooperative in aiding the Union to secure information. GE submits that it spent over $100,000 in fulfilling Union requests. Indeed, in several instances where the necessary data was too costly to obtain, or was unavailable, GE suggested a substitute, which substantially satisfied the Union's needs without straining the Company's resources.

Once formal negotiations were underway, however, GE's attitude changed markedly. A pattern gradually began to develop in which the Union would propose a particular benefit, Company negotiators would label it as "astronomical," or "costly," and when pressed by the Union for figures to back up their cost criticisms, would respond with "we talk level of benefits, not costs."

---

the Board in another case decided that the unit was not an appropriate one. The NLRB held that since his conduct was illegal at the time that it occurred, the employer could not rely on the later NLRB decision to purge itself, and thus sustained an unfair labor practice finding.

Here, however, there was no outstanding ruling that an employer might propose new terms to a collective bargaining agreement on a take-it-or-leave-it basis; *Equitable*, decided a year later, was a case of first impression. More to the point, *Columbine* merely held that later decisions would not be a defense to charges based on law in effect at the time that the conduct occurred. GE apparently is assuming that the converse principle is necessarily true—indefensible in logic, and with a nod to Justice Holmes, equally so in law.

There were times when the format changed, but the result remained relatively the same. On occasion, the Company might suggest one set of employment security provisions, which the Union did not like. When the Union indicated that it preferred its proposals to the Company's, the Company responded that the Union alternates were too costly. GE refused to indicate the cost of Union proposals, or how much it was willing to expend, so that the Union might recast its demands. The following exchange is not atypical:

> Swire (Union): We are asking for an improvement in maternity. We want the Company to pay everything up to $550, then co-insurance after that.
>
> Willis (Company): Something like that is out of reach. Maternity is the most expensive item.
>
> Swire: What does it cost, Sid?
>
> Willis: We talk level of benefits, not costs.

The cases that have dealt with the difficult problem of giving meaning to "bargaining in good faith" are instructive. In *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956), the company claimed that a wage increase of over 2½ cents per hour would put it out of business, but refused to furnish the Union with any indication of its financial status. The Supreme Court, in finding that the Company had committed an unfair labor practice, commented,

> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152-53.

See also *NLRB* v. *George P. Pilling & Son Co.*, 119 F. 2d 32 (3d Cir. 1941); *NLRB* v. *Western Wirebound Box Co.*, 356 F. 2d 88 (9th Cir. 1966).

Moreover, it is not always necessary that the Company put the cost of its proposals in issue, or even refuse Union demands on the ground that they are too costly. In *Sylvania Electric Products, Inc.* v. *NLRB*, 358 F. 2d 591 (1st Cir.), cert. denied, 385 U.S. 852 (1966), the court decided (without raising the issue of cost justifications by the company) that pension and insurance costs (which it labeled "collateral" issues) should be made available to the Union where it wished to weigh the value of such plans against an increase in take-home pay.[6] This is particularly true, of course, where the Company contributes to the plan, thus in effect substituting it for wages.

The rationale of these opinions seems obvious; if the purpose of collective bargaining is to promote the "rational exchange of facts and arguments" that will measurably increase the chance for amicable agreement, then sham discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema. See Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

The Board and the Trial Examiner relied on two specific instances of refusal to furnish information to sub-

---

6 GE argues that a prior decision of the First Circuit, *Sylvania Electric Products, Inc.* v. *NLRB*, 291 F. 2d 128 (1st Cir.), cert. denied, 368 U.S. 926 (1961), denied discovery of such information for a noncontributory plan and thus demonstrated that the state of the law was, at the very least, highly unsettled. In the first *Sylvania* case, however, the court was careful to indicate that if the Company interposed a cost objection to a Union proposal—as here—the Union might be entitled to the cost figures, citing *Truitt*. In any event the second *Sylvania* case expressly distinguished the first almost to the point of extinction by permitting the Union to demand cost information wherever the Union sought to weigh the value of different possible wage-benefit packages.

stantiate their unfair labor practice charge. The first was an oral request by the Union on August 24 for the number of employees with one year, and with twenty years, of service, so that the Union might determine the cost of its demand for a fourth week of vacation for employees with 20 or more years of service. Carey later pointed out that this request was in response to the Company's labelling the Union's vacation plan as "astronomical." Hilbert, for GE, stated that the Company did not have the information; on August 31 Moore responded that GE was discussing "the level of benefits."

The second refusal to furnish information relied upon occurred in September. When the Union, on September 8, sought to evaluate the number of employees who would have benefited from the Company's Income Extension Aid proposal, had it been in effect for the past two years, Moore responded, "Somewhere between zero and 100 per cent." Later in the month, on September 22, the IUE put this and other requests for information in writing, and submitted them to GE. Like the original August oral request, the cost information the Union wanted was put in issue by the Company's repeated references to cost as a justification for rejecting Union proposals, or as a reason for preferring Company plans.[7] GE also frequently couched its objections to Union demands on the ground of "competition," thereby implying that the cost of the IUE proposals was a material element in its considerations. See *Local 5571, United Steelworkers of America* v. *NLRB*, 401 F. 2d 434 (D.C.

---

7 For example, on August 31, GE negotiators rejected the Union's SUB proposal as "an expensive item," but then refused to value its own income extension aid (IEA) proposal because "we haven't figured it out yet," but SUB "would cost a lot more." Similar discussions occurred over pensions, insurance, wages, and the cost-of-living escalator clause that the Company wanted dropped from the new contract.

Cir. 1968); *NLRB* v. *George P. Pilling & Son Co.*, 119 F. 2d 32 (3d Cir. 1941).

The September 22 letter requested basically five categories of information: (A) cost per employee of proposed insurance benefits; (B) cost per employee of proposed pension benefits; (C), (D) number of employees likely to benefit from the Company's income extension aid (IEA) program; (E) number of employees with 20 or 25 years of continuous service.[8] The last request, like that made

---

8 The text of the letter was as follows:

September 22, 1960

Mr. Philip D. Moore, Manager
Employee Relations Service
General Electric Company
570 Lexington Avenue
New York 22, New York

Dear Sir:

We have made oral requests several times, since General Electric announced its contract proposals on August 30, 1960, for information necessary for intelligent bargaining on this matter. The requests were rejected.

In order that we may be in a position to appraise the cost of your proposals, and to determine the number of people who might benefit by them, we renew our request for the following information with respect to the employees in each of the General Electric bargaining units represented by the Union and its locals:

A. Cost per employee, and also for employee dependents, of each proposed new insurance benefit, and of each proposed increment in existing benefits, broken down into

(1) cents per month premium, and

(2) cents per month net cost estimated on basis of the Company's 1959 experience.

B. Cost in cents per hour per employee of the proposed increment in each of the pension benefits.

C. Number of employees on the Company's recall list as of June 30, 1960, for

(1) less than 6 months;

(2) more than 7 months and less than one year;

(3) more than one year.

(*continued on following page*)

orally on August 24, was designed to test the Company's assertion that an extra week of vacation after 20 years would be too expensive, and that one after twenty-five years would be preferable.

Addressing ourselves first to the oral request of August 24, GE never did reply until it answered the same question, posed under "E," above, after the strike was over. While there is some dispute over whether the Union orally requested the information for the whole Company or for IUE units alone, there is no disagreement that GE had the figures available on a company-wide basis.

Even if we were to assume that the Union had asked for figures for IUE units alone, GE's failure to provide the information is inexcusable. The Trial Examiner appropriately found that GE could readily have obtained the data from local plants, and even had it been unwilling to do so, it could, at a minimum, have informed the Union that it had the information available on a company-wide basis, which the Union probably would have found just as useful (since GE indicated that it would put the same benefits into effect for all employees, pursuant to its uni-

---

D. Number of employees who have been recalled since January 1, 1960, and who, prior to their recall, had been laid off

(1) less than 6 months;

(2) more than 6 months and less than one year;

(3) more than one year.

E. Number of employees with [following handwritten to semicolon]

(a) 20 years;

(b) 25 years or more continuous service.

We would appreciate having this information without delay.

Very truly yours,

/s/ JAMES B. CAREY
James B. Carey
President

formity policy). Thus, under the most favorable interpretation of the facts, GE's offhanded refusal to submit information on an issue which it had itself raised, would amount to an unfair labor practice. This conclusion is fortified by GE's behavior in the prenegotiation meetings, when it demonstrated that it was capable of providing information—indeed even suggesting that it be provided—in a form different from that originally desired. If we were to hold that because the information requested did not conform precisely to the data in the possession of the Company, an employer might refuse to provide any data at all, we would, in our view, be taking a step backwards, towards incorporating all the worst features of the ancient common law pleading system into our present-day labor negotiations. GE seems to suggest that even an insignificant variance between the request and the available information would be a complete bar to the Union—even though it was utterly unaware of the precise form in which the Company kept its records, and the Company refused to enlighten it. In a day when liberal pleadings, liberal discovery, and modern rules of evidence have largely superseded ancient formalism, grafting such a pointless and dysfunctional rule onto negotiating procedures is clearly out of place.

GE did finally respond to item "E," as well as items "C" and "D" in the September 22 letter, on November 7, after the strike had been settled and the contract agreed upon.[9] All three of the requests required that the Company collect information from its local plant managers; GE, however, waited until October 24 to initiate the collection

---

9 The Company also answered with a letter on September 28, which refused items A and B as "speculative," indicated that C and D "would take some time" and answered that portion of E relating to 25 years of service, but not that for 20 (despite the fact that the latter request had been made orally more than a month earlier).

process. The Company also claims that mass picketing, violence, and problems of shutting down struck plants forced it to delay. But, as the Trial Examiner pointed out, this retrospective explanation fails to explain the initial delay of a week, before the strike began. The Trial Examiner, who had the opportunity to observe and evaluate the testimony, refused to credit this explanation. Finding that his conclusion (adopted by the Board) is supported by substantial evidence (and is not vigorously contested by the Company), we conclude that the Company committed an unfair labor practice by failing to provide the information, highly relevant to the negotiations, within a reasonable time. See *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260 (2d Cir.), cert. denied 375 U.S. 834 (1963); *Utica Observer Dispatch, Inc.*, 111 N.L.R.B. 5863, enforced 229 F. 2d 575 (2d Cir. 1956); *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, enforced 205 F. 2d 131 (1st Cir.), cert. denied 346 U.S. 887 (1953). See also section 10(e), 29 U.S.C. §160 (e) (1964); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) (Frankfurter, *J.*).

Items A and B, mentioned in the September 22 letter—the estimated per employee pension and insurance data—were never provided by the Company. It insisted that it was not legally required to disclose the cost of fringe benefits to it, and that in any case the information was so "purely speculative" that compiling it would be both burdensome and valueless. The first contention seems clearly wrong. In order for the Union to assess properly the Company's objections to some of its proposals, and to understand which of GE's objections to cost were soundly based, the IUE had to have the basic data on which to make informed choices.

A union weighing wages against benefits, or one form of benefit against another, should receive answers to its

genuine non-burdensome requests for cost information. If the Union were denied such data, it would be unable to bargain intelligently, and arrive at sensible and reasoned decisions, particularly those involving reallocation of benefits within GE's cost framework. Even the first *Sylvania* decision indicated that when the employer (as here) puts cost in issue, or the discussion involves a contributory plan (as here), the Union may be entitled to cost information. See also note 6, *supra*.

The Company further urges that since the Trial Examiner found that some of the information would have been difficult or expensive to obtain in the form requested, it need not have provided it. But GE had most of the information in some form that would have been useful to the Union, and easily could have either presented it in that form, or at least advised the Union that it had other relevant information (like the C, D, and E data) available. The objection is unavailing.

The last major claim is that future pension and insurance costs were "purely speculative" and only "educated guesses." The difficulty with this stand is that it would excuse the Company from furnishing virtually all information of which it was not absolutely certain. In bargaining, as in most other circumstances, it is the use to which the information is put that should determine the degree of accuracy that is required. The root question, as posed in the second *Sylvania* case, is whether the data "would significantly aid in the bargaining process." 358 F. 2d at 592. There can be no question that the information available would have assisted the Union here; GE committed an unfair labor practice in withholding it.[10]

---

10 A last claim, like that made in the take-it-or-leave-it personal accident insurance unfair labor practice, is that bad faith could not be found since GE under then-existing precedents could not have known that its

C. *Bargaining Directly with Locals*

As we have pointed out above, GE and the IUE had a consistent pattern of national negotiations for over ten years before the 1960 strike. There can be little doubt that the Board's finding that GE recognized and dealt with the IUE-GE Conference Board as representative of all IUE locals was both supported by substantial evidence and correct.[11]

Once the strike was imminent, however, GE abandoned this pattern, and dealt separately with several of the IUE locals. On September 29, GE notified the IUE at their bargaining meeting that after October 1, it would consider its contractual obligations at an end; it would continue current wages, benefits, and seniority, but such union-related matters as dues checkoff, grievance time pay and superseniority for union officials, would have to be "considered."

That same day, however, GE headquarters authorized their local Employment Relations Manager, A. C. Stevens, in Schenectady to offer more to the local there than had been offered to the national negotiators, if Schenectady Local 301 stayed at work. Specifically, all the union-related provisions of the old contract—dues checkoff and the like—were to remain in effect, while at the national level, GE

---

conduct would be found wanting. It deserves the same reply. What has been said should indicate that GE's reliance on the first *Sylvania* case is misplaced, particularly where the Union's need was clear, and the Company's refusal not attributable to a legitimate concern other than doing the minimum that the law required.

11 At Louisville, Waterford, and Bridgeville, the IUE itself was certified as the bargaining agent; at Schenectady, Syracuse, Lynn, and Pittsfield, individual locals were certified. However, by reason of consistent past practice, GE was obliged to treat the IUE-GE Conference Board as the representative of all.

had committed itself only to "consider" them. On October 4, Stevens wrote to Leo Jandreau, Local 301's business agent, stating:

> "We agree to extend to you protection of the recent contract, including grievance machinery, protection covering working conditions, seniority, prices, wage rates, and any other condition of employment recited in the contract. Current cost-of-living adders will remain in effect. We will continue union representation recognition as presently constituted and all the above will remain in effect so long as we are not on strike."

On the same day, the local Employee Relations Manager at Pittsfield made a similar offer, containing the same truce conditions, which was broadly publicized.[12] The IUE then filed an unfair labor practice charge, based on the offers to the locals. Several days later (about October 10), GE offered the same terms to the national negotiators.

On the day the Company made its Schenectady-Pittsfield terms available to the IUE generally, the Lynn, Massachusetts Employment Relations Manager, Robert Burns, wrote to Lynn Local 201's Business Agent, and proposed:

> ". . . we meet to work out a memorandum of intent which would re-establish for all employees represented by Local 201 all of the provisions which were in the contract . . . which . . . would go into effect when Local 201 terminates the strike in Lynn while contract negotiations continue."

---

12 GE claimed that the Pittsfield Local initiated the discussion of truce terms. The Trial Examiner, who had the opportunity to observe the witnesses, disbelieved this testimony, and the Board sustained him. We are unable to say that his finding is unsupported by substantial evidence; in any case, it should not matter who initiates the dealing. See *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 683 (1944).

At Waterford, a similar proposal was made to the local Business Agent, and union members were telephoned by their foremen and urged to convince their local officers to accept the return to work proposal.

At Louisville, Kentucky, the Employee Relations Manager forwarded a copy of the Company's October 10 proposal along with a noncommittal letter to the Local Business Agent indicating that the copy might be "helpful" in removing the "confusion" over how employees might return to work. The Bridgeville, Pennsylvania Employee Relations Manager also forwarded a copy of the proposal, but he in addition added that he was

> ". . . suggesting it to you and other Local 640 officials as a means of permitting local members to return to their jobs and to continue to earn their wages, until a settlement agreement is reached."

At Syracuse, in a phone conversation between the Local President and the Union Relations Manager, the Manager not only suggested accepting the terms now offered to the IUE nationally, but indicated that the President and several other Syracuse employees could have their alleged strike misconduct suspensions lifted if they returned to work.

The Trial Examiner and the Board agreed that in each instance GE committed an unfair labor practice when it went behind the backs of the national negotiators and offered separate peace settlements to locals. *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944) sustains this conclusion. In *Medo*, several employees who appeared to represent a majority met with their employer to express their dissatisfaction with the union representing them. They offered to abandon it if their wages were increased.

When the Employer treated with the dissenting employees, the Court held, he violated section 9(a) of the Act, 29 U.S.C. §159(a) (bargaining representatives of the union are "exclusive"). Therefore, he committed unfair labor practices under sections 8(a)(1) and 8(a)(5), 29 U.S.C. §§158(a)(1), 158(a)(5) (1964). *Medo* instructs that it does not matter who initiates the by-passing of the bargaining representatives. 321 U.S. at 683. Subsequent cases appear to have applied the doctrine even where the offer to the local or to the employees was no better than that made to the bargaining representative. See, e.g., *Independent Stave Co.* v. *NLRB,* 352 F. 2d 553 (8th Cir. 1965), cert. denied, 384 U.S. 962 (1966) (by implication). We have, under similar circumstances, condemned efforts by an employer to take a matter up with his employees, where their bargaining representative had already taken a stand on the matter. *Utica Observer-Dispatch* v. *NLRB,* 229 F. 2d 575 (1956). But cf. *NLRB* v. *Penokee Veneer Co.,* 168 F. 2d 868 (7th Cir. 1948).

The terms offered at Schenectady and Pittsfield were in fact better than those made available to the national negotiators. There can be no question but that such offers clash with the *Medo* rationale, for they cut deeply into the Act's command that bargaining representatives be "exclusive." See §9(a), 29 U.S.C. §159(a) (1964). The Company's claim that it had to "clarify" its position to the Schenectady management so that they would know what terms to effectuate if the local there came to work ignores the fact that it was the Company's vagueness on return to work provisions that caused the need for clarification. In any case, the additional union-related terms should have been offered to the national negotiators for their consideration before—or at least at the same time that—they were

given to the locals; yet GE waited until the Union had filed an unfair labor practice charge to do so. We agree with the Board that GE committed an unfair labor practice by failing to respect the IUE-GE Conference Board's status as exclusive bargaining representative.

The other proposals complained of occurred after October 10, and so there is no question (with the possible exception of Syracuse) of offering more to the local than to the national negotiators. Yet, as we have suggested, this factor cannot be dispositive. The vice that *Medo* sought to avoid was the practice of undermining the authority of the union's bargaining representatives through direct dealings with the locals or employees they represented. Such tactics are inherently divisive; they make negotiations difficult and uncertain; they subvert the cooperation necessary to sustain a responsible and meaningful union leadership. The evil, then, is not in offering more. It is in the offer itself.

At Lynn and Waterford it is clear that the employment managers were proposing that they and the local make a separate settlement. At Lynn, GE even offered a separate "letter of intent." Bridgeville is similar, and though the evidence is not so strong, the Board might reasonably have found that the manager there was suggesting an independent settlement. The offers of reinstatement at Syracuse place that proposal as well in the forbidden category, for they indicate that an individual settlement was being held out to the local.

At Louisville, however, the only indicia the Board relies on pointing to a separate agreement, or to treating separately with the local, is the fact that the letter was addressed to the local's president. A fair reading of the brief missive, however, fails to disclose that it had any-

thing more than an informational purpose, giving the content of the proposal made at the national level previously. The basic distinction is between attempting to reach a separate settlement with the local—as at Schenectady—and keeping the local informed of Company positions. In circumstances such as these, the interest in free speech and informed choice must prevail over the slight possibility that the representatives' positions might be undermined, and thus we believe the Board's finding is unsupported by substantial evidence. See *NLRB* v. *Penokee Veneer Co.*, 168 F. 2d 868 (7th Cir. 1948). Cf. *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966) (favoring "uninhibited, robust" debate).

V.

Overall Failure to Bargain in Good Faith

We now approach the most troublesome and most vigorously contested of the charges. In addition to the three specific unfair labor practices, GE is also charged with an overall failure to bargain in good faith, compounded like a mosaic of many pieces, but depending not on any one alone. They are together to be understood to comprise the "totality of the circumstances." Despite my brother Friendly's distaste for the term, past decisions have indeed emphasized that good faith—or lack of it—must in the absence of a per se violation depend upon a factual determination based on the overall conduct of the party charged. See *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 498 (1960); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956). The Board can hardly be faulted for resting its finding on a ground that the Supreme Court has mandated. Certain specific practices, such as making uni-

lateral changes in working conditions during bargaining, can be found to constitute per se violations of the duty to bargain, since they constitute a "refusal to negotiate in fact." See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). When such conduct is present, the Board need make no finding that the totality of the party's conduct manifests bad faith; the practice itself is conclusive on that issue.

The Board, however, chose to find an overall failure of good faith bargaining in GE's conduct. Specifically, the Board found that GE's bargaining stance and conduct, considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large. This plan had two major facets: first, a take-it-or-leave-it approach ("firm, fair offer") to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured the Company as the true defender of the employees' interests, further denigrating the Union, and sharply curbing the Company's ability to change its own position.

The Board relies both on the unfair labor practices already discussed and on several other specific instances to show that GE had developed a pattern of conduct inconsistent with good faith bargaining. It points to GE's proposed personal accident insurance proposal on a take-it-or-leave-it basis as an example of an attempt to bypass the Union, and an attempt to disparage its importance and usefulness in the eyes of its members. GE's response to this is that the *Equitable* case had not been decided in 1960. Therefore, it argues, its actions were based on a "justifiable belief" in the state of the law at that time and cannot support the view that the Company was motivated by bad faith.

This reasoning overlooks the principle that acts not in themselves unfair labor practices may support an inference that a party is acting in bad faith. See *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 506 (1960) (Frankfurter, *J.*, concurring). While GE may have believed that it was acting within its "rights" in offering a take-it-or-leave-it proposal, doing so may still be some evidence of lack of good faith. Here there was no substantial justification offered for refusing to discuss the matter, other than a niggling—and incorrect—view of the contract and the statute. Cf. *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir.) (Magruder, *J.*) ("must make *some* reasonable effort in *some* direction"), cert. denied 346 U.S. 887 (1953). Given the effects of take-it-or-leave-it proposals on the Union, already set forth in our review of the specific unfair labor practice charges, the Board could appropriately infer the presence of anti-Union animus, and in conjunction with other similar conduct could reasonably discern a pattern of illegal activity designed primarily to subvert the Union.

We have already discussed at length the Company's failure to furnish information. As in the instance of the personal accident insurance proposal, GE's attitude on information was characterized by a pettifogging insistence on doing not one whit more than the law absolutely required, an insistence that eventually strayed over into doing considerably less. GE's conduct, as the Board's opinion points out, was all of a piece. It negotiated, to the greatest possible extent, by ignoring the legitimacy and relevance of the Union's position as statutory representative of its members. Thus it is hardly surprising that IUE requests for information were met (at least once negotiations had begun) with less than enthusiasm, for

they reflected the Union's contrary belief that it had to know the worth of the Company proposals in order to evaluate them for its members.

GE's reluctance to part with information was not limited to the specific instances complained of as an unfair labor practice. The record discloses that even before the general reopening of negotiations, GE displayed a patronizing attitude towards Union negotiators inconsistent with a genuine desire to reach a mutually satisfactory accord. During the early meetings devoted to employment security, GE's responses to the Union's detailed proposals were vague and uninformative, hardly calculated to apprise the IUE of GE's stand on any of the matters about which it wanted to negotiate. When the Union finished presenting its plan, GE, instead of offering counter-proposals, or commenting specifically on the IUE's suggestions, offered a prepared lecture series on the general causes of economic instability, a response not at all designed to enlighten the Union on specific bargainable matters. This impression is reinforced by Moore's consistent refusal to permit the lecturing Employee Relations Managers to answer specific Union inquiries.

More crucial, perhaps, was the Company's persistent refusal, after publicizing its proposal, to estimate not only the cost of components of its offer, but the total size of the wage-benefit package it would consider reasonable. Responses such as "it hasn't occurred yet" were interposed when IUE negotiators asked for estimates of the GE offer; yet the trial examiner found (as GE's bargaining philosophy required) that considerable cost studies had in fact been made, which would have been of substantial assistance to the Union. Without an estimate of the overall size of GE's offer, the Union was hamstrung in its efforts to

decide which substitutions were reasonable, whether to press for more total benefits, or how much redistribution could be accomplished within GE's cost framework.

In addition to its reluctance to make meaningful cost disclosures, GE occasionally took untenable and unreasonable positions and then defended them, with no apparent purpose other than to avoid yielding to the Union. The most flagrant example occurred in setting the date for the beginning of pension and insurance benefits. As indicated in our opening discussion of the negotiating background, GE vacillated back and forth, chose inconsistent and confusing explanations at random, interposed some inconsequential attempts to pass the problem off with banter, and finally settled by characterizing the date it had chosen as "appropriate." See note 2 *supra*, and accompanying text. Certainly, GE could insist on any dates that it desired—but its manner of responding to Union inquiries reflected its philosophy of "bargaining."

When the last act was virtually played out and it had become apparent that the Union would have to end its abortive strike and concede to GE's terms, the Company continued to display a stiff and unbending patriarchal posture hardly consistent with "common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason." *NLRB* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (3d Cir. 1941). With the Union, as it were, "on the ropes," the Company insisted that IUE choose the options that it preferred, and assent to the contract unconditionally, without ever seeing the final contract language. When the Union protested that the memorandum proposed for its signature was too vague, the Company refused to submit more definite language. Four days later, the Union capitulated completely and signed the short form memo-

randum, still without having seen the final contract to which it was agreeing.

In a similar vein the Company rejected the notion of a bilateral strike settlement agreement. Instead, it proffered a unilateral "letter of intent." While again, it is true GE did not have to sign a joint settlement agreement, it gave no reason for refusing to do so (other than that this had been its past practice). The Board might reasonably infer that its prime purpose was to avoid recognizing the Union's status as bargaining representative of the striking employees, and not to further any legitimate business aim.

GE argues forcefully that it made so many concessions in the course of negotiations—concessions which, under section 8(d), it was not obliged to make—that its good faith and the absence of a take-it-or-leave-it attitude were conclusively proven, despite any contrary indicia on which the Trial Examiner and the Board rely. The dissent proceeds under the misapprehension that we consider lack of major concessions as evidence of bad faith. Rather, we discuss them only because while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a strong inference of good faith. On close examination, however, few of the alleged concessions turn out to have a great deal of substance. Its offer of a wage reopener accompanied its original proposal; the option to choose a vacation instead of a wage increase was included over the Union's objections (at least during the negotiating meetings), and changes in the Pension Plan were more in the nature of clarifications than actual shifts in position, or in any case involved issues of quite minor significance.[13]

---

13 For example, to describe the reduction in Union representatives' pension contributions as a "concession" as the dissent urges, seems inap-

The Company's stand, however, would be utterly inexplicable without the background of its publicity program. Only when viewed in that context does it become meaningful. We have already indicated that one of the central tenets of "the Boulware approach" is that the "product" or "firm, fair offer" must be marketed vigorously to the "consumers" or employees, to convince them that the Company, and not the Union, is their true representative. GE, the Trial Examiner found, chose to rely "entirely" on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible. Bypassing the national negotiators in favor of direct settlement dealings with employees and local officials forms another consistent thread in this pattern. The aim, in a word, was to deal with the Union through the employees, rather than with the employees through the Union.

The Company's refusal to withhold publicizing its offer until the Union had had an opportunity to propose suggested modifications is indicative of this attitude. Here two interests diverged. The command of the Boulware approach was clear: employees and the general public must be barraged with communications that emphasized the generosity of the offer, and restated the firmness of GE's position. A genuine desire to reach a mutual accommoda-

---

propriate. GE simply indicated that it would conform its deductions to the actual 1960 actuarial estimates, rather than the higher (and by 1960 incorrect) 1955 assumptions.

As to "yielding" on Exclusion K, the Company, in response to a Union request, revealed that it had *already* revised its health insurance proposal to provide payments to employees insured under other contributory group medical coverage. More simply put, the Company on its own motion (or possibly, although not certainly, in response to a prior union inquiry of September 20) decided that GE employees who paid full premiums on both GE and other contributory group plans should not be required to forego their GE benefits. Those whose spouse, for example, received family coverage under a plan paid in part by another

tion might, on the other hand, have called for GE to await Union comments before taking a stand from which it would be difficult to retreat. GE hardly hesitated. It released the offer the next day, without waiting for Union comments on specific portions.[14]

The most telling effect of GE's marketing campaign was not on the Union, but on GE itself. Having told its employees that it had made a "firm, fair offer," that there was "nothing more to come," and that it would not change its position in the face of "threats" or a strike, GE had in effect rested all on the expectation that it could institute its offer without significant modification. Properly viewed, then, its communications approach determined its take-it-or-leave-it bargaining strategy. Each was the natural complement of the other; if either were substantially changed, the other would in all probability have to be modified as well. It is only in this context that GE's incomprehensible insistence on a January 1 starting date for the pension benefits, and the "explanations" that followed it, can be understood.

All this was brought into the open during the September 28 meeting. Virtually on the eve of the strike, Union

---

employer, would still receive nothing under the GE plan. With all due respect, the characterization "minor" still seems appropriate.

14 GE claims that the IUE first released the Company offer to its members. Examining the basis for this claim, we find it insubstantial. First, the IUE releases occurred only after GE announced that it would not delay publication of its offer, but would give it to the media the next morning, August 31. Second, both the instances relied upon involved incidental mimeographed flyers, one of which stated that it was not to be released until after 4 P.M. August 30. When viewed against the Company's coordinated, massive campaign, both instances appear unplanned and inconsequential. For example, a typical employee at some of the larger plants received over 100 written Company communications during September and October. On many days he was subjected to two, and sometimes three or four GE messages, not including oral discussions and meetings with Company supervisors.

negotiators were searching for a way to save face by reconstituting their SUB proposal within the outlines of the Company's costs. Far from being frivolous as the dissent seems to suggest, such last minute attempts at compromise are the stuff of which lasting accommodations and productive labor-management relations are made. The substance of the Company's response to this effort was well put by their chief negotiator, Philip Moore:

> "After all our month of bargaining and after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no."

The Company, having created a view of the bargaining process that admitted of no compromise, was trapped by its own creation.[15] It could no longer seek peace without total victory, for it had by its own words and actions branded any compromise a defeat.

GE urges that section 8(c), 29 U.S.C. §158(c) (1964), prohibits the Board from considering its publicity efforts in passing on the legality of its bargaining conduct. The section reads:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expres-

15 Similarly, GE's insistence on putting its pension and wage benefit proposals into effect before the IUE agreed to them, or the old contract was at an end (contrary to prior practice) dovetailed with its communications program, since its policy of uniformity meant that it intended firmly to see that union members would receive the same and no more. This is but one more example of how a policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct.

sion contains no threat of reprisal or force or promise of benefit."

GE would have us read that section as a bar to the Board's use of any communications, in any manner, unless the communication itself contained a threat or a promise of benefit. The legislative history, past decisions, and the logic of the statutory framework, however, indicate a contrary conclusion.

The bald prohibition of section 8(c) invited comment when it was enacted, as well as later. Senator Taft replied to some of the criticism of the bill that bears his name:

> "It should be noted that this subsection is limited to 'views, arguments, or opinions' and does not cover instructions, directions, or other statements that would ordinarily be deemed relevant and admissible in courts of law." I Legislative History of the LMRA 1947, at 1541.

The key word is "relevant." The evil at which the section was aimed was the alleged practice of the Board in inferring the existence of an unfair labor practice from a totally unrelated speech or opinion delivered by an employer. Senator Taft later indicated, for example, in the context of a section 8(a)(3) discriminatory firing, that prior statements of the employer would have to be shown to "tie in" with the specific unfair labor practice. I Legislative History of the LMRA 1947, at 1545. Later references to the section described the barred statements as those which were "severable or unrelated," and "irrelevant or immaterial." II Legislative History of the LMRA 1947, at 429 (Senate Report), 549 (House Conference Report). The objective of

8(c) then, was to impose a rule of relevancy on the Board in evaluating the legality of statements by parties to a labor dispute.[16] Its purpose was hardly to eliminate all communications from the Board's purview, for to do so would be to emasculate a statute whose structure depends heavily on evaluation of motive and intent. See e.g., §§8(a)(1), 8(a)(3), 8(a)(5).

The cases have largely supported this view. The Board may rely on communications to establish discriminatory treatment in violation of sections 8(a)(3) and 8(a)(1). See *NLRB* v. *Lipman Bros., Inc.*, 355 F. 2d 15 (1st Cir. 1966); *Hendrix Mfg. Co.* v. *NLRB*, 321 F. 2d 100 (5th Cir. 1963). Employer communications were used to evaluate the presence of a state of mind inconsistent with the obligation to bargain in good faith in *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 268 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963); and *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229 (5th Cir. 1960).

While it is clear that the Board is not to control the substantive terms of a collective bargaining contract, nonetheless the parties must do more than meet.[17] Our brother

---

16 See *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 62 n. 5 (1966):

"The wording of the statute indicates, however, that §8(c) was not designed to serve this interest by immunizing all statements made in the course of a labor controversy.

* * * * *

It is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union motive [sic] to an employer on the basis of his past statements." [Citations omitted.]

Congress may also have been concerned with the Board's "captive audience" doctrine, by which employer speeches during working time were found to be unfair labor practices. See Casenote, 57 Mich. L. Rev. 615 (1959). That problem, of course, is not present here, and supports our view of the restrictive scope of section 8(c).

17 Thus we find no ground for disagreement with the portion of Judge Burger's dissent in *United Steelworkers of America* v. *NLRB*,

Friendly makes much of the point that General Electric did bargain and reach an "agreement" with the Union. He says that prior 8(a)(5) cases demanded nothing less than a showing of no such desire to reach an agreement, and opines that without such a "definite standard" an 8(a)(5) violation may not be made out. Some cases have indeed spoken of the evil of a "desire not to reach an agreement with the Union" as crucial. While the dissenting opinion cites *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953), for that authority, we hasten to note that Judge Magruder was careful in his opinion not to be misled, as our dissenting brother appears to be, by words that seem on the surface quite simple but in practice require a highly pragmatic and individualized interpretation. Judge Magruder did not suggest that "desire not to reach an agreement" could be found, as the dissent suggests, by a clearly delineated series of steps, X_1, X_2, X_3, taken to "point Y, plus a number of additional items, Z_1, Z_2, Z_3." Far from being a devotee of the new math, he would have agreed with Learned Hand that numbers, even more than words, "are utterly inadequate to deal with the fantastically multiform occasions which come up in human life." In the case before Judge Magruder, Reed & Prince submitted a woefully inadequate and demeaning "offer" of a contract. Presumably, the Union could have seen no alternative but to accept it, and had it done so, our brother Friendly would have held that the Company bargained with a "desire to reach an agree-

---

390 F. 2d 846 (D.C. Cir. 1967), cert. denied, 391 U.S. 904 (1968), cited by our brother Friendly. Indeed, we are somewhat perplexed at the unusually heavy reliance our dissenting brother places on a dissenting opinion. The author of that opinion is now the Chief Justice of the United States.

ment," and thus had not violated the proscriptions of §8(a)(5). Judge Magruder, on the other hand, said that the "employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if §8(a)(5) is to be read as imposing any substantial obligation at all." 205 F. 2d at 135. His point, of course, was that "desire to reach agreement" may mean different things to different people, but in the context of a meaningful and purposeful reading of section 8(a)(5) it must mean more than a willingness to sign a piece of paper. The statute does not say that any "agreement" reached will validate whatever tactics have been employed to exact it. To imply such a Congressional purpose would be to encourage parties to make their violation so blatant that it would be impossible for the other side to continue to exist without signing. Instead the statute clearly contemplates that to the end of encouraging productive bargaining, the parties must make "a serious effort to resolve differences and reach a common ground," *NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a "predetermined resolve not to budge from an initial position." *NLRB* v. *Truitt Mfg. Co.,* 351 U.S. 149, 154-55 (1956) (Frankfurter, *J.,* concurring). These are not simple tests; they will not be resolved by formular incantations. Sadly, neither will they be so precise that one will always know the exact limits of what is allowed, and what forbidden—but this is a problem hardly unknown in the law or to judges. The difficulty here, however, arises out of the herculean task of legislating a state of mind. Congress has ordered the Board—and this court—to effectuate its policy of encouraging good faith bargaining, and not to avoid it because the mandate is difficult to apply. The Board has done just that. And, on the basis of substantial evidence

we agree. A pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits "going through the motions" with a "predetermined resolve not to budge from an initial position." See *NLRB* v. *Truitt Mfg. Co., supra* (concurring opinion).

The employer who leaves for a long vacation, giving his negotiator instructions not to budge is no different from the employer who remains on the scene and commands the same behavior daily. Cf. Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1418 & n. 61 (1958). We are assumed to intend the natural and probable consequences of our acts.

The Company and the dissenting opinion seem to take the novel position that the holding in *Insurance Agents'*—that the Board might not forbid a partial strike during bargaining—ousts the Board's control over bargaining tactics. But in *NLRB* v. *Katz,* 369 U.S. 736 (1962), the Court held that at least one tactic—instituting unilateral changes during bargaining—was forbidden, for it put a bargainable topic outside the reach of the bargaining process. GE has done no less; it has, if anything, done more. By its communications and bargaining strategy it in effect painted itself into a corner on *all* bargainable matters.

In order to avoid any misunderstanding of our holding, some additional discussion is in order. We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the "best offer first" bargaining technique is forbidden. Moreover, we do not require an employer to engage in "auction bargaining," or, as the dissent seems to suggest,

compel him to make concessions, "minor" or otherwise. See p. 44, *supra*.

Our dissenting brother's peroration conjures up the dark spectre that we have taken a "portentous step" which "'contains seeds of danger for unions'" as well as employers. This picturesque characterization is unfortunate for it is a scare-phrase which tends to distract from the facts in this case. It paints over with a broad stroke the care we have taken to spell out the bounds of our opinion. We hold that an employer may not so combine "take-it-or-leave-it" bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken. It is this specific conduct that GE must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings. Such conduct, we find, constitutes a refusal to bargain "in fact." *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). It also constitutes, as the facts of this action demonstrate, an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a). See *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229, 234 (5th Cir. 1960).

We have considered the Company's other arguments, including those in favor of disqualifying Board Member Fanning, and against reinstating the replaced workers, but we find them unavailing.[18] The petition for review is

---

18 We do not think that Board Member Fanning's use of the term "boulwareism" was indicative of bias; the term is more description than invective. See note 1 *supra*.

Since the Board might reasonably have found that the unfair labor practice was a cause of the strike, reinstatement of replaced strikers was proper. *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

denied, and the petition for enforcement of the Board's order is granted.[19]

---

19 The dissent joins GE and the intervenor Union in attacking the Board's order as wanting in specificity. While a more detailed order would be preferable, we are aware that:

> "Once good faith is found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion." *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956) (Frankfurter, J., concurring).

See also *NLRB* v. *Celotex Corp.*, 364 F. 2d 552, 554 (5th Cir. 1966), cert. denied 385 U.S. 987 (1966). Courts do not rubber stamp requests by the NLRB for a contempt citation pursuant to a general bargaining order. See, e.g., *NLRB* v. *Corsicana Cotton Mills*, 179 F. 2d 234 (5th Cir. 1950). It is reasonable to assume that before a court would undertake to cite either a union or an employer for contempt, it would afford the party every opportunity to show that it was not contumacious, and had made a good faith effort to comply with the terms of the bargaining order. See *NLRB* v. *Corsicana, supra; NLRB* v. *Athens Mfg. Co.* 163 F. 2d 255 (5th Cir. 1947).

We are also mindful of the excessively lengthy and complicated history of this case, and are unwilling to add needless pages and innumerable days to it by remanding to the NLRB for a more specific order, or by starting the interminable process anew. To illustrate, the action has been before the Board and the courts for nine years; one procedural matter has been to the Supreme Court already. The negotiating minutes occupy 1300 pages; the transcript (taken on 79 separate dates) before the Trial Examiner another 10,000. The Trial Examiner's Intermediate Report covers some 240 pages in the appendix to this action; GE took 527 exceptions to that report before the full Board. The NLRB's opinion was mercifully short, but briefs before this court ran to almost 500 pages. We need not dwell on the exhibits, which detailed (in detail) a substantial portion of Union and Company publicity efforts.

The dissent (p. 19), undoubtedly relying on newspaper reports, suggests that it is "scarcely possible that the Company's actions are so nearly parallel to those of 1960 . . . ." For what it is worth, we quote the last three paragraphs of a recent news report:

> A company spokesman objected to a description of the company's offer on Tuesday as its "first" because, he said, this implied that there would be a second or third.
>
> He said that the company had put its "whole offer" on the table and that nothing had been held back for later concessions.
>
> Asked if he meant that the offer was the company's final one, he replied, "Not necessarily, but it is all that should be there at this time." New York Times, Oct. 9, 1969.

WATERMAN, *Circuit Judge* (concurring):

I fully concur with my brother Kaufman. Without differing from the majority opinion in any way and without reiterating its arguments, I would challenge my brother Friendly's dissenting assertion that the standard set forth by Judge Kaufman for determining overall bad faith is vague or difficult to apply. A company may make a firm, fair offer to the union and may stand by that offer, but the company should not be permitted to advertise to its employees that it believes in the firmness of its offers for the sake of firmness.

We recognize that a company is entitled to insist on the terms of its original offer if it believes that the union can be made to accept that offer. That GE refused to yield to union demands without giving reasons based upon cost, maintained a "stiff and unbending" posture, used a unilateral letter of intent when final agreement was reached, failed to make significant concessions, and publicized its offer without waiting for union suggestions do not indicate anything except that GE made and stood by what it conceived to be a fair, firm offer.

What makes these practices unfair is GE's "widely publicized stance of unbending firmness," that is, GE's communications to its employees that firmness was one of the company's independent policies. Two distinct evils derive from such publicity. First, publicity regarding firmness tends to make the company seal itself into its original position in such a way that, even if it wished to change that position at a later date, its pride and reputation for truthfulness are so at stake that it cannot do so. Second, publicity regarding firmness fixes in the minds of employees the idea that the company has set itself up as their representative and therefore that the union is superfluous.

Doubtless these evils exist to some extent whenever a company makes, and stands by, a firm fair offer even when there is no company publicity of the kind here involved. However, it seems clear that publicity tends to amplify these undesirable tendencies to the point that, in a case such as this one, the amplification can well be construed to have been activated by a company motive not to bargain in good faith.

On the other side of the ledger there is very little positive good which can derive from company publicity which indicates that a company believes in firmness for firmness' sake. The free speech benefits of publicity in labor negotiations lie in the fact that informed employees will better know whether to vote for or against a strike and how to evaluate the union's performance on their behalf. These benefits can all be reaped by a company which advertises the terms of an offer and its belief that these terms are fair, without also stating that as a matter of policy it can never be persuaded to change the advertised terms. Such advertisement could only tend to convince employees that because firmness is a company policy it is also a company policy to ignore the union. A company, of course, can advertise its belief that its offer is fair, and that, at the particular time, it sees no reason to change its offer even to forestall a strike. This kind of statement is different from advertising that it is company policy never to change any offer in response to union pressure.

This view does not differ from that of the NLRB, nor does it indicate that the Board reached the right result for the wrong reasons. The trial examiner, whose opinion the Board adopted, specifically condemned GE's declarations that "a union could obtain no added benefits that it would not otherwise grant." 150 N.L.R.B. at 279. Because of this dominant wrong, we agree with the trial examiner that

other aspects of the communications program also evidenced bad faith on the facts of this case although not as a matter of law. 150 N.L.R.B. at 274. It does no violence to the doctrine of *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) to point out which of those factors correctly relied upon by an agency in the case at hand will also be instrumental in determining decisions in the future.

FRIENDLY, *Circuit Judge* (concurring and dissenting):

I agree with my brothers that by refusing to furnish cost information and by bargaining with locals during the strike, GE violated §8(a)(5) of the National Labor Relations Act. I do not believe it also violated the Act by submitting a contributory personal accident insurance plan to the Union and declining to bargain about it until the time for reopening of negotiations. I think also, along lines similar to Member Jenkins' concurring opinion, that other specific conduct of the Company, such as that in regard to the effective date of the pension plan, pp. 12-13, and the form of the strike settlement agreement, p. 17, could properly have been condemned and an appropriate order framed. However, the majority of the Board was at pains to emphasize that its finding of overall bad faith was not based upon identifiable acts or failures to act that GE could avoid in the future but rather

> upon our review of (1) the Respondent's entire course of conduct, (2) its failure to furnish relevant information, (3) its attempts to deal separately with locals and to bypass the national bargaining representative, (4) the manner of its presentation of the accident insurance proposal, (5) the disparagement of the Union as bargaining representative by the communication

program, (6) its conduct of the negotiations themselves, and (7) its attitude or approach as revealed by all these factors.[1]

Such attempts to restrict communications (item 5) and lay down standards with respect to bargaining techniques, attitudes and approaches (items (6) and (7)), bring the Board into collision with §§8(c) and (d) and the important policies they embody. It is easy to understand that anyone reviewing this enormous record would emerge with a good deal of sympathy for the situation of the Union and distaste for the tactics of the employer; no one likes to see a person who regards himself as in a strong position pushing it unduly, even though the fairness of GE's offer is not challenged. But the Act does not empower the Board to translate such feelings into a finding of an unfair labor practice, and judicial sanction of such efforts to intrude into areas which Congress left to the parties may in the long run be quite as detrimental to unions as to employers. See *N. L. R. B.* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

I.

Before I elaborate my doubts with respect to the determination of overall bad faith, it will be desirable to outline the basis for my disagreement with the conclusion that GE's proffer of a personal accident insurance plan on a contributory basis, before the beginning of the contractual period for bargaining, constituted an independent violation of §8(a)(5). While the Board's order contains no specific reference to this, at least three members relied heavily upon it for their conclusion of overall lack of good faith (see

1 Numbers have been inserted for convenient reference.

item (4)), as does the lead opinion here. If this conclusion is wrong, as I think it to be, such an important element is removed from the "totality of the circumstances" on which the Board relied that, on this ground alone, we could not properly enforce the order as to overall bad faith.

Discussion of the issue must begin by clearly delineating what it is not. No one is suggesting, as the majority intimates, p. 20, that GE could unilaterally change the terms of an agreed insurance plan to the detriment of its workers. Still less is anyone suggesting, see p. 22, that GE could confer a benefit only on non-union members. It is not even claimed that the Company could make a benefit effective for employees represented by a union without advising the union and obtaining the latter's consent. The narrow issue is whether an employer is prohibited from even putting such a proposal to a union at a time when bargaining is not required under the contract unless he is willing to bargain about it then and there.

Section 8(a)(5), as elaborated in §8(d), requires the employer and the representatives of the employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ." When an agreement has been reached, its provisions define what constitute "reasonable times" for bargaining. Here GE and the Union provided in the 1955 Pension and Insurance Agreement in the most explicit terms that "each of the parties voluntarily and unqualifiedly hereby waives any and all rights to require that the other party or parties hereto bargain collectively during the terms of this Agreement, with respect to any such subjects or matters whether or not such matters are covered by this Agreement." See n. 4 to the majority

opinion. Unless language in a labor agreement is to be denied its plain meaning, this protects GE's conduct here. I wholly fail to perceive how the Company's further insistence on a specific renunciation by the Union of strikes, etc., to enforce modifications of insurance and pension benefits outside of a bargaining period in any way qualifies the language I have quoted.

N. L. R. B. v. *Katz*, 369 U.S. 736 (1962), the decision relied upon to support the conclusion that GE's proffer of a contributory personal accident insurance plan violated §8(a)(5), is more striking in its differences than in its resemblances. There, *during a period of bargaining*, the employer *made* three unilateral changes with respect to terms and conditions of employment; the Court's decision, scarcely a surprising one, was that this constituted "a refusal to negotiate *in fact*." 369 U.S. at 743. Here GE merely *submitted a proposal* and did this *at a time when it had no duty to bargain at all.*

While I can understand that an employer's refusal to bargain about a benefit he has voluntarily proffered during the term of an agreement may not be pleasing to a union, that does not violate the Act, at least when the contract expressly permits it. The majority attempts to escalate the problems by suggesting that the course here followed would create "divisive tendencies within the Union," and even enable the Company "to pick the Union apart piece by piece." P. 21. These comments, unsupported by the record, are singularly inappropriate as applied to the offer of a contributory personal accident insurance plan which employees with hazardous occupations were free to accept and those with routine duties to decline, which could hardly affect the Union's position on the next negotiating round since it cost GE nothing other than the costs of administra-

tion, where the Company refused to make capital of the Union's rejection, and when the Union considered the issue so unimportant that it did not even bring the matter up for negotiations during the formal bargaining sessions. One could also argue, in opposition to the majority's position, that the Board's determination offends the policy, although not indeed the letter, of the lengthy proviso to §8(d), since requiring an employer to bargain in a situation such as that presented here, with the corollary that the union may support its bargaining demands with strike threats or strikes, see *NLRB* v. *Lion Oil Co.*, 352 U.S. 282 (1957), undermines the broad purpose of enabling such modifications as are made during the term of an agreement to be made peaceably. However, it is enough for me that nothing in the Act or the court decisions under it can fairly be read to prohibit an employer, during the period of a contract when bargaining would not otherwise be required, from asking a union whether it will consent to his giving a benefit to the employees whom it represents. Cf. *N. L. R. B.* v. *Honolulu Star-Bulletin, Inc.*, 372 F. 2d 691 (9 Cir. 1967).

II.

The objective of §8(a)(5), as stated by the Senate Committee on Education and Labor, S. Rep. No. 573, 74th Cong. 1st Sess. 12 (1935), was to impose a duty on employers "to recognize such representatives as they have been designated . . . and to negotiate with them in a *bona fide* effort to arrive at a collective bargaining agreement . . ." In 1947 the fear was expressed in Congress that the N. L. R. B. "has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or

may not make." H. R. Rep. No. 245, 80th Cong. 1st Sess. 19 (1947). As a result Congress enacted §8(d), expressly providing that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." See *N. L. R. B.* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 402-04 (1952). At the same time, in the light of other actions of the Board, Congress added §8(c), declaring in unequivocal terms that:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

The great bulk of the Board's salutary decisions under §8(a)(5) have been in areas far removed from any possibility of conflict with §§8(c) or (d). Perhaps the most important single group consists of cases where the employer has refused to deal with a union at all or, as in GE's dealing with locals, has negotiated over its head; in such instances, although the Board normally issues a broad order to bargain in good faith, no one supposes that the order dictates just how the bargaining shall be conducted. Beyond that the Board, with the approval of the Supreme Court, has usefully identified a considerable number of practices constituting *per se* violations. These include refusal to sign a written contract embodying an agreement, *H. T. Heinz Co.* v. *N. L. R. B.*, 311 U.S. 514 (1941), a practice now specifically prohibited by §8(d); offering employees, during the course of negotiation, more than was offered through the union, *N. L. R. B.* v. *Crompton-High-*

land Mills, Inc., 337 U.S. 217 (1949); making unilateral changes while bargaining is in process, *N. L. R. B.* v. *Katz, supra*, 369 U.S. 736; refusing to furnish available information needed by the union to evaluate a bargaining position, *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); and insisting as a condition of agreement upon a subject outside the area of mandatory collective bargaining, *N. L. R. B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

The danger of collision with §§8(c) or (d) arises only when the Board makes a finding of violation although the parties have sat down with each other and have not engaged in any proscribed tactic. Still I have no difficulty with the Board's making a finding of bad faith based on an entire course of conduct so long as the standard of bad faith is, in Judge Magruder's well-known phrase, a "desire not to reach an agreement with the Union." *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1 Cir.), *cert. denied*, 346 U.S. 887 (1953). In such instances, the difficulties inevitable in an examination of the "totality of the circumstances" and an order based upon them are outweighed by the definiteness of the standard, the consequent feasibility of compliance, and the necessity for such an order if the employer's duty to recognize the union is to be carried out in substance as well as in form. See, e.g., *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676 (9th Cir. 1943).[1a] However, as Professor Cox remarked in a notable article which has been cited with approval by the Supreme Court,

---

1a The lead opinion is in error in its speculation concerning what I "would have held" had I sat in *Reed & Prince* but an agreement had been reached on the employer's terms. There is simply no analogy between Reed & Prince's conduct, see 205 F. 2d at 138-39, and GE's response to the Union by an offer of a 3% increase for the first two years and a 4% increase for the third and numerous additional benefits, plus the further changes referred to below.

N. L. R. B. v. *Insurance Agents' Union, supra,* 361 U.S. at 489-90, and has not suffered from the lapse of a decade, it is "doubtful whether much is gained by retrospective review of the negotiations when the parties have actually bargained together." The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1439 (1958). Here the General Counsel conceded that GE entertained no such prohibited desire and, despite the majority's innuendoes concerning antiunion animus, the Trial Examiner rightly observed that no claim was "made in this case that the respondent was seeking to rid itself of the Union," with which it had been dealing for many years and expected to deal for many more.

The only prior court decision that has approved a finding of overall bad faith when there was a desire to reach an agreement is *United Steelworkers of America* v. *N. L. R. B.,* 390 F. 2d 846 (D.C. Cir. 1967), *cert. denied,* 391 U.S. 904 (1968), a decision rendered over the dissent of Chief Justice (then Judge) Burger. However one may regard that decision, the Board's case was far stronger than here. The employer had refused to budge from an adamant position against a voluntary check-off although it had granted this to a more favored union three years before, had propagandized the employees that a previous similar refusal on its part had destroyed a union, and had advanced no business reasons whatever, "all in a context of vigorous anti-union animus." 390 F. 2d at 852. There was thus considerable basis for inferring that the employer was seeking eventually to rid itself of the union despite its desire to reach an agreement at the moment. Yet even in that context Judge Burger referred to the Board's postulating "the novel and internally inconsistent proposition that a bargainer can be found to have refused to bargain in

good faith even while at the same time it is found to have engaged in bargaining in a good faith effort to reach an agreement and has actually reached a final and binding contract," 390 F. 2d at 853.[2]

Although both the Board and the majority here have been quite explicit in describing what they are not deciding, they are far less informative with respect to what they are. The closest the lead opinion comes to this is its statement (p. 53) that its basis for upholding the order with respect to overall bad faith is "that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken." My brother Waterman, though avowedly concurring fully, takes what seems to me a quite different view, namely, that GE's "bargaining methods" were entirely lawful and only its allegedly publicization of a "stance of unbending firmness" was unfair.

While the lead opinion makes much use of the "take-it-or-leave-it" phrase, it never defines this. I should suppose it meant a resolve to adhere to a position without even listening to and considering the views of the other side. To go further and say that a party, whether employer or union, who, after listening to and considering such proposals, violates §8(a)(5) if he rejects them because of confidence in his own bargaining power, would ignore the explicit command of §8(d)—as Judge Waterman recognizes. Although the taking of such a hard position may be unattractive, the attitude is one which the law allows an employer or a union to take, despite the dictum

---

2 I thus cannot understand how the majority can agree with Judge Burger's dissent, n. 17, and still reach the result it does.

in Justice Frankfurter's concurring opinion in *N. L. R. B.* v. *Truitt Mfg. Co., supra,* 351 U.S. at 154.

It surely cannot be, for example, that a union intent on imposing area standards violates §8(b)(3) if it refuses to heed the well-documented presentation of an employer who insists that acceptance of them will drive him out of business. Neither can it be that a union violates §8(b)(3) if it insists on its demands because it knows the employer simply cannot stand a strike.[3] It must be equally true that an employer is not to be condemned for "take-it-or-leave-it" bargaining when, after discussing the union's proposals and supporting arguments, he formulates what he considers a sufficiently attractive offer and refuses to alter it unless convinced an alteration is "right." Hence the Board correctly declined to affix the "take-it-or-leave-it" label which my brother Kaufman uses.

Once we rid ourselves of the prejudice inevitably engendered by this catch-phrase, we reach the argument that a party violates §8(a)(5) if he gets himself into a situation where he is "unable to alter a position once taken," even though he would otherwise be willing to do so.

While this sounds fair enough, as does the Board's somewhat similar remark about the continuing duty to give "unfettered consideration," it would seemingly outlaw practices that no one has considered illegal up to this time. A union that has won a favorable contract from one employer and has broadcast that it will take no less from others seems to me to be quite as "unable to alter a position once

---

3 *Cutler* v. *N. L. R. B.*, 395 F. 2d 287 (2 Cir. 1968), is another illustration of the permissibility of union obduracy. Although the employer's failure to press his demands made it possible for this court to uphold the decision in favor of the union without reaching the issue of overall good faith, it would require some naiveté to suppose that any efforts by the employer in that case to get the musicians' union to alter its wage scale would have borne the slightest fruit.

taken" as GE was here, yet I should not have supposed this violated the Act. So also with an employer who has negotiated a contract with one union and has proclaimed that he will do no better for others. To say that taking such positions violates §§8(b)(3) or 8(a)(5) is steering a collision course with §8(d).

Moreover, I find no substantial evidence that GE got itself into the predicament the majority depicts. The best evidence to the contrary consists of the changes the Company in fact made. In response to Union objections to the offer as initially presented informally, GE modified it to include a wage reopener on April 1, 1962, as an alternative to the automatic 4% increase it had proposed. On September 9, *after* it had publicized its offer and in response to feelers from some Union negotiators, it advanced the option of substituting an additional holiday and a fourth week of vacation for employees with 25 years of service in exchange for 1% of this 4%.[4] Twelve days later it agreed to reduce the costs of the Union's representatives' pension plan from 6% of the first $4800 and 15% thereafter to 4% and 10%—which the Union's chief negotiator called "an excellent proposition." Even though, as the majority states, the reduction was responsive to new actuarial calculations, this shows that GE was not using a mere form of words when it said it would make a change if convinced one was "right." Finally, GE yielded on a clause, Exclusion K, in its insurance plan[5] which the chairman of the Union negotiating committee had characterized as having "caused

---

4 The Union was offered the choice of exercising this option on a plant-by-plant basis so that plants where employees with longer service predominated could accept the vacation option and others could retain the added pay.

5 This prevented recovery of benefits for an employee or his dependents if they were covered by other group insurance.

more dissatisfaction among the people than anything else." The Union's insurance specialist called this "a good improvement."

The Union's appraisals of the value of these concessions at the time is more impressive than the depreciation of them nine years after the event. Moreover, in appraising such concessions it is important to remember Judge Burger's caution that, although it may sometimes be necessary to consider "the reasonableness of parties' positions on particular issues to determine whether, under all the circumstances of the negotiation, a particular bargaining position was adopted for the purpose of frustrating negotiating generally and thus preventing an agreement," "the courts have been vigilant lest the examination of parties' positions to test good faith become a process of judging, directly or indirectly, the substantive terms of their proposals." *United States Steelworkers of America* v. *N. L. R. B., supra,* 390 F. 2d at 853 (dissenting opinion). By characterizing some of the changes as "of quite minor significance," the lead opinion does precisely that.

I find nothing on the other side substantial enough to outweigh this evidence that GE remained able to adopt changes it thought to be "right." Much is made of the September 28 exchange between Jandreau, Moore, and Hilbert over a Union proposal that the Income Extension Aid funds and part of the money for a wage increase provided in the Company offer be used instead for Supplementary Unemployment Benefits (SUB). The lead opinion, following the Trial Examiner, misinterprets Hilbert's remarks. Hilbert's objection to the Union proposal was that it came at so late a date that the Union could not seriously expect the Company to act upon it. He said that there were only three reasons why the Company might change its offer

at such a time; if they had deliberately held something back for horse-trading; if they had made an error in deciding what was "right"; or if they were so afraid of a strike that they would give in even though they continued to believe that their offer was "right." *If* the first or last reasons had applied, he said, GE would indeed look foolish in the eyes of its employees and the public at large, but they did not apply.[6]

III.

An essential element to the Board's conclusion of GE's offending was the Company's publicity campaign. "The disparagement of the Union as bargaining representative" is item (5) in the Board's bill of particulars. The Board elaborated this by saying it is unlawful "for an employer to mount a campaign, as Respondent did, both before and during negotiations, for the purpose of disparaging and discrediting the statutory representative in the eyes of its employees, to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests."

I find no warrant for such a holding in the language of the statute, its legislative history or decisions construing

---

6 More generally, Hilbert's and Moore's remarks must be set in context before they can be properly understood. SUB had first been proposed by the Union and rejected by the Company in the 1958 negotiations. It was again raised and again rejected in the early 1960 meetings on employment security. The Company's opposition was based largely on principle rather than cost, so that Jandreau's protests that he was trying to work within the cost framework of the Company were beside the point in its view. Considered in this context, and with the strike looming four days off, Hilbert's objection that the Union proposal came too late does not seem ill taken. But even here, after Moore had made the statement quoted in the majority opinion and Jandreau had said "There is no sense in being here," Moore replied "Unless there is anything you want us to hear. If you have something new or persuasive, persuade us."

it. GE's communications fit snugly under the phrase "views, argument, or opinion" in §8(c). The very archetypes of what Congress had in mind were communications by an employer to his workers designed to influence their decisions contrary to union views, and communications by unions to workers designed to influence their decisions contrary to employer views. The statute draws no distinctions between communications by an employer in an effort to head off organization[7] and communications after organization intended to show that he is doing right by his employees and will do no more under the threat of a strike. Congress had enough faith in the common sense of the American working man to believe he did not need—or want—to be shielded by a government agency from hearing whatever arguments employers or unions desired to make to him. Freedom of choice by employees after hearing all relevant arguments is the cornerstone of the National Labor Relations Act.

As for the legislative history of §8(c), the full text of Senator Taft's remarks in this context was:

> The purpose of this language is to make it clear that the Board is not to use any utterances containing [no] threats or promises of benefits as either an unfair practice standing alone or as making some act which would otherwise not be an unfair labor practice, an unfair labor practice. It should be noted that this subsection is limited to "views, argument, or opinions" and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would or-

---

7 See generally Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 66-92 (1964).

> dinarily be deemed relevant and admissible in courts of law. 2 Legislative History of the LMRA, 1947, at 1541 (1948).

It is plain that GE's communications came under the protection of the statute, and not the exception which Senator Taft described. The word "relevant" in Senator Taft's speech cannot be blown up to such a degree as to render the amendment largely nugatory. The case is in sharp contrast with *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 268 (2 Cir.), cert. denied, 375 U.S. 834 (1963), cited by the Board and the majority, where the company's general manager said that he would "die and go to hell before he would sign a contract" and told his employees to "get those union agitating sons of bitches out of Fitzgerald." *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 299 (5th Cir. 1960), the only other case cited by the Board in support of this part of its opinion, is equally inapposite.

The Trial Examiner's criticisms of GE's communications as being one-sided and "massive," and as portraying the union negotiators in an unfavorable light, which were endorsed by the Board and are reflected in the lead opinion, see fn. 14, ignore the whole thrust of §8(c). Although Mr. Justice Black was in dissent in *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 67-68 (1966), there was no disagreement with his statement:

> When Congress passed the National Labor Relations Act, it must have known, as almost all people do, that in labor disputes both sides are masters of the arts of vilification, invective and exaggeration.

It is for unions and employers, not for a government agency, to determine how "massive" their communications shall be.

The Examiner coined a phrase, echoed both by the Board and in the lead opinion, see p. 45, namely, that GE's communications program was an attempt "to deal with the Union through the employees rather than with the employees through the Union." Somewhat parallel to this is the opinion's statement that the Company "deliberately bargain[ed] and communicate[d] as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a)," p. 53. Picturesque characterizations of this sort, at such sharp variance with the record, scarcely aid the quest for a right result. Members of Congress would probably be surprised to learn that being "exclusive representatives" means that interested parties may not go to constituents in an endeavor to influence the representatives to depart from positions they have taken. There can be nothing wrong in an employer's urging employees to communicate with their representatives simply because the communication is one the representatives do not want to hear. I thus find it impossible to accept the proposition that, by exercising its §8(c) right to persuade the employees and by encouraging them to exercise their right to persuade their representatives, GE was somehow "ignoring the legitimacy and relevance of the Union's position as statutory representative of its members" (p. 41).

Apparently accepting this, Judge Waterman would narrow GE's offending, not only with respect to the publicity program but on the whole issue of overall bad faith, to its communicating "that firmness was one of the company's independent policies." The first thing to be said about this is that even if my brother were right, we would not be justified in enforcing the Board's order on that basis. "An administrative order cannot be upheld unless the grounds

upon which the agency acted in exercising its powers were those upon which its action can be sustained." *S. E. C.* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943), and the Board's opinion leaned so heavily on the Company's disparagement of the Union that we cannot disregard this on the basis that it would have ruled the same way even had it known it was wrong in its reliance. Moreover, GE certainly could not be sure it would be in compliance if it desisted merely from the one tactic that Judge Waterman condemns. My second difficulty is that his position would seemingly outlaw conduct such as in the cases I have put—where a union "finally" tells workers that it will not take less from one employer than it has won from another or an employer "finally" proclaims he will give no more to one union than he has to another. The third is that if his or the lead opinion implies that GE's publicity got it into a position where it could not yield even if it was convinced that it should, the necessary factual support does not exist. There is no need to repeat what has been said in the previous section of this opinion on that score. I add only, in response to Judge Waterman's proposed rationale, that, as I read the Trial Examiner's report, he made no finding that the publicity had produced any such result. His condemnation of the Company's "finality" campaign referred solely to communications following the resumption of negotiations after the strike vote, and the sense in which he understood the term "finality" is clarified by his statement that "The repeated mentions of the finality of the offer . . . were coupled throughout . . . [this period] with declarations pointing up the inevitable futility of a strike, regardless of its duration, in the light of the Company's policy not to give more *simply* to avert a strike." (Emphasis added.)

Since a policy not to give in just because of a strike is not a violation of §8(a)(5), I cannot understand why communication of that policy to employees should be. The fact that strikes to coerce acceptance of union demands are "part and parcel of the process of collective bargaining," *NLRB v. Insurance Agents' Union, supra,* 361 U.S. at 495, does not forbid the employer's doing his best to avoid being coerced by them. This, of course, does not change his duty to continue negotiations and to negotiate in good faith. But so far as economic warfare and vulnerability to it are concerned, the Act allows the parties a maximum of self-protection. No one denies that §8(c) protects employer communications attempting to persuade employees that they should not strike because the offer fully meets their needs, because union leaders are seeking a strike for personal reasons, or because a strike will cost too much in lost pay. To prohibit an employer from adding that the mere fact of a strike would gain nothing in the way of further concessions would remove his most important and most relevant argument. Yet this is all that GE's much discussed finality campaign amounted to and, with one insignificant exception, the campaign made the point in the narrowest way it could. GE did not say "If you strike we will automatically lock ourselves into our offer," but only that GE was not deliberately holding anything back and had to be convinced that its original offer was no longer "right" before it would make a change.[8]

It is doubtless true in labor as in other negotiations that the louder people shout, the harder it becomes for them to change their positions without unacceptable loss

8 I thus cannot accept Judge Waterman's characterization that GE publicized "that, as a matter of policy, it can never be persuaded to change the advertised terms."

of face. In that sense any positive public declaration, whether by an employer or by a union, may run counter to the objective of securing industrial peace by promoting agreement. But the Board has been expressly prohibited from promoting peace by restricting speech. Conformably with the dictates of the First Amendment, Congress, when it enacted §8(c), determined the dangers that free expression might entail for successful bargaining were a lesser risk than to have the Board police employer or union speech.

IV.

Even if one were to take the benevolent view toward the portion of the Board's opinion and order relating to overall bad faith that is done by the majority, it is beyond debate that if this decision should stand, it would open up wholly new problem areas in the application of §§8(a)(5) and 8(b)(3). I cannot perceive any sufficient reason for doing this when, as I see it, the order cannot be enforced in any practical sense and deals with events of half a generation ago.

The only standard of conduct set for GE by the Board's opinion is that a mix of the "fair, firm offer" technique pursued to an unknown point X, plus a communications program pursued to an equally unknown point Y, plus a number of additional items, Z_1, Z_2, and Z_3, is proscribed. This already sufficient confusion is now compounded by the difference in my brothers' efforts at elucidation.

In view of the general obscurity of what GE is and is not permitted to do, the Company could take little comfort from the majority's assurance that it will be given a full opportunity to show it has made a good faith effort at compliance before it is held in contempt. In fact, however,

no contempt proceeding could be successfully maintained. For the Supreme Court has very recently declared, in the closely related context of an equitable decree with respect to work stoppages, that "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Longshoremen's Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).[9]

The venerable age this case has attained is a further reason for declining to churn up waters that already are troubled enough. We are dealing with an alleged unfair labor practice of *nine years ago*. Four years were taken by the Board to render a decision—itself some indication that Congress never intended to impose any such "herculean task." Passing over the two years spent in quarrels in the courts over venue and the Union's right to intervene, three more elapsed before the case was argued to us. Since then there have been two further negotiations, in 1963 and 1966. Another, in which the IUE's bargaining position has been significantly bolstered by a decision of this court in which I joined, *General Electric Co.* v. *NLRB*, 412 F. 2d 512 (1969), is now in progress. Although the unions have called a strike and filed unfair labor practice charges, in part because of GE's adhering to a "fair, firm offer" of a first year increase less than the unions sought and with annual wage reopeners instead of automatic increases,

---

9 Acknowledging the impossibility of enforcing the order as written, and proposing that this court should supply a rationale which the Board's decision lacks, a sympathetic commentator has suggested that the only way to sustain the order would be to "hold single offer bargaining to be an unfair labor practice." Cooper, Boulwarism and the Duty to Bargain in Good Faith, 20 Rutgers L. Rev. 653, 689-92 (1966). But we could not uphold it on that basis even if the evidence supported a finding of "single offer bargaining," which it does not, see *SEC* v. *Chenery Corp.*, *supra*, 318 U.S. 80. The lead opinion rightly does not do this, and the concurring opinion expressly disclaims any such view.

many of the principals in the 1960 negotiations are no longer on the scene and it is scarcely possible that the Company's actions are so nearly parallel to those of 1960 that an order in this case, even had it been made earlier, would have supported a contempt proceeding.

I am well aware of the Supreme Court's statement that "Congress has introduced no time limitation into the Act except that in §10(b)," *NLRB* v. *Katz*, 369 U.S. 736, 748 n. 16 (1962). Still, as it seems to me, a court must have some discretion to decline to enforce a Labor Board order relating to practices nearly a decade in the past when, as here, the parties have engaged in bargaining, any harmful effect of the alleged unfair labor practice has been dissipated, the case was one of first impression, and there has thus been no "stubborn refusal to abide by the law." *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 705 (1944).

In conclusion, I respectfully suggest, as Judge Burger did in *United Steelworkers of America* v. *N. L. R. B.*, *supra*, 390 F. 2d at 858, "that today's holding contains the seeds of danger for unions in their collective bargaining rights" as well as for employers in the exercise of theirs. It constitutes also a serious indentation of §§8(c) and (d), if not, indeed, of the First Amendment. For the reasons I have indicated, I believe the majority's decision to be deeply mistaken—the familiar instance of a hard case producing bad law. In any event, I think that, because of the confusion as to what the Board's order means and the lapse of time, the case is exceedingly inappropriate for taking such a portentous step.

I would grant enforcement with respect to the failure to furnish information and the bargaining with locals, and would otherwise deny.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29,502

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

GENERAL ELECTRIC COMPANY,

Respondent,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

No. 29,576

GENERAL ELECTRIC COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

THESE CAUSES were submitted to this Court upon a petition to review, and a petition to enforce, an order of the National Labor Relations Board dated December 16, 1964, against General Electric Company, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on June 3, 1969, and has considered the briefs and transcript of record filed in these causes. On October 28, 1969, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order and denying the petition to review. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that General Electric Company, its officers, agents, successors and assigns, abide and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against General Electric Company.

STERRY R. WATERMAN
Judge, United States Court of Appeals
for the Second Circuit

IRVING R. KAUFMAN
Judge, United States Court of Appeals
for the Second Circuit

APPENDIX B

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 et seq.) are as follows:

Section 8(a)

> "It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • • •
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 8(c)

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency estab-

lished to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Section 10(e)

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by *substantial* evidence *on the record considered as a whole* shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the

hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Section 10(f)

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy

of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 9 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, *Petitioner,*

—against—

NATIONAL LABOR RELATIONS BOARD, and INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

MILTON A. SMITH
General Counsel

ANTHONY J. OBADAL
Labor Relations Counsel

WILLIAM R. WALTER
Labor Relations Attorney
Chamber of Commerce of the United States of America
1615 H Street, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, *Petitioner,*

—against—

NATIONAL LABOR RELATIONS BOARD, and INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,800 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 37,000.

---

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

An overwhelming majority of members of the National Chamber are engaged in interstate commerce or activities which affect interstate commerce and are subject to the National Labor Relations Act. Because of the significance of the legal issues involved in this case, and because of their substantial effect, both immediate and potential, upon its members, the National Chamber submits this brief *amicus curiae* in support of the position of petitioner urging review by this Court of the decision below.

The far reaching consequences that this decision may have for American industry have stirred widespread national concern in industry's ranks and have created confusion among them regarding the boundaries of the duty to bargain in good faith under Section 8(a)(5) of the National Labor Relations Act, as amended (the "Act"), as well as the scope of an employer's constitutional and statutory right to communicate with his employees.

The National Chamber, as an organization whose membership is broadly representative of the commerce and industry of this country, is in a unique position to present to this Court practical insights, concerning the impact of this decision on collective bargaining in general and the conflicts which it creates.

ARGUMENT

In this brief the National Chamber will limit itself to discussion of the conflicts created by the holding below on the central issue in the case.

Employers have until now looked to the decisions of this Court in *NLRB* v. *Insurance Agents' Union, AFL-CIO*[2] and *NLRB* v. *American National Insur-*

[2] 361 U.S. 477 (1960).

ance Company[3] as defining the elements of good faith in bargaining and as identifying a genuine desire to reach agreement coupled with meeting and conferring in good faith to that end as a discharge of the statutory duty.

The assumption by the Board in the case at bar of the role of regulatory agency over the substance and techniques of bargaining and over the adequacy of concessions made by the parties therein is in conflict with and casts question and doubt on those decisions. The absence of the regulatory power here asserted by the Board had been made explicit in 1947 when Congress enacted Section 8(d) of the Act. Congress then expressed the fear that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of concessions an employer must make and of the proposals and counterproposals he may or may not make." It concluded that "unless Congress writes into the law guides for the Board to follow the Board may attempt to carry this process even further and seek to control more and more the terms of collective bargaining agreements." 1 Leg. Hist. of the Labor-Management Relations Act of 1947 at 310-12. The House Conference Report subsequently described the resultant bill as having achieved this objective:

> "... the Senate amendment [now Section 8(d)], while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as did the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus pre-

[3] 343 U.S. 395 (1952).

vented the Board from determining the merits of the position of the parties." *Id.* at 538.

Section 8(d) notwithstanding, the fears of Congress have been proven justified by, among others, the Board's action in this case, as well as by its decision in another case presently pending before this Court on writ of certiorari and in which the Chamber previously filed briefs *amicus curiae*.[4]

Additional confusion was created by the denials contained in the opinions of both judges who made up the majority below (App. A. 52, 55)[5] of any intent to forbid the "best offer first" bargaining technique or the right of an employer to make and stand by an initial offer, while at the same time applying a standard of good faith bargaining which would effectively foreclose the use of such techniques if coupled with a full exercise of free speech to employees.

Until now the right of an employer freely to express his opinions, views or arguments had been considered assured by the First Amendment to the Constitution and Section 8(c) of the Act. Nevertheless, the Labor Board in this case sought to regulate the volume and content of non-coercive employer communications on the unprecedented ground that they emphasized a policy of firmness in bargaining of which it disapproved. The inevitable effect of such regulation is to curtail, if not completely shut off, employer communications during and prior to negotiations in order to avoid the risk of a Board finding that the employer's

---

[4] *H. K. Porter Company, Inc. (Disston Division—Danville Works)* v. *NLRB*, No. 230, October Term, 1969.

[5] Reference is to Appendix A to the petition of the Company herein.

views somehow manifested a degree of resolve or firmness which would, in the Board's subjective opinion, tend to inhibit the employer's ability to make further concessions in bargaining. Such an effect is contrary to this Court's expressed views on free speech in labor relations. See *e.g., Thomas* v. *Collins,* 323 U.S. 516, 532 (1945); *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 62 (1966). It also is contrary to the express language of Section 8(c) of the Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

MILTON A. SMITH
General Counsel

ANTHONY J. OBADAL
Labor Relations Counsel

WILLIAM R. WALTER
Labor Relations Attorney
Chamber of Commerce of
the United States of
America
1615 H Street, N. W.
Washington, D. C.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 11 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION

IRVING ABRAMSON
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Attorneys for Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Questions presented	1
Statement of the case	3
The Board's finding of fact	3
The Board's order	9
The Decision of the Court of Appeals	10
Reasons for denying the writ	13
I. None of the questions stated in the petition is presented by the record below	13
A. The premise of the First, Second and Third Questions that GE had a "genuine desire to reach agreement" is negatived by the Board's contrary finding which was sustained by the Court of Appeals	13
B. The further premise of the First, Second and Third Questions, that GE met and conferred with the Union in furtherance of a genuine desire to reach agreement and engaged in a course of bargaining, is negatived by the Board's contrary finding	15
C. The premise of the Second and Third Questions that GE's communications sought to influence employees in support of GE's bargaining policy, is contrary to the finding of the Board and the court that GE relied exclusively on communications as a substitute for the bargaining which should have been but was not	16
D. The premise of the Second, Third and Fourth Questions that the Board's order attempts to regulate or limit freedom of speech has no basis in the Board's order	17

Page

E. The Fifth Question relates to an issue which was not made the basis of any specific provision in the order but was one item among many which in totality support the general order to cease refusing to bargain in good faith 18

F. The premise of the Fifth Question that GE's proposal of the accident insurance program constituted a benefit is not supported by the record 19

G. The premises of the Sixth Question that GE did not plead inability to pay and that the cost of changes in pension and insurance plans was too speculative and conjectural for disclosure are negatived by the Board's contrary findings which were sustained by the Court of Appeals 20

II. All of the holdings of the court below turn on GE's subjective bad faith and hence present no issue of law for review of this court 21

III. None of the holdings of the court below is in conflict with any decision of this Court or of any of the Courts of Appeals 23

IV. The decision below is correct and presents no issues requiring review by this Court 27

Conclusion 28

AUTHORITIES CITED

CASES:

Coppus Engineering Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957) 25

General Electric Co. v. NLRB, 412 F.2d 512 (2d Cir. 1969) 25

International Brotherhood of Electrical Workers and Phil Sears, 9-CB-1455, etc., decided January 28, 1970, DLR 2/4/70 p. A-9 24

Page

Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966) 25
NAACP v. Button, 371 U.S. 415 (1963) 27
NLRB v. American National Insurance Co., 343 U.S. 395 (1952) 23, 28
NLRB v. Celotex Corp., 364 F.2d 552 (5th Cir. 1966) cert. den. 385 U.S. 987 27
NLRB v. Colvert Dairy Products Co., 317 F.2d 44 (10th Cir. 1963) 25
NLRB v. Express Publishing Co., 312 U.S. 426 27
NLRB v. Honolulu Star-Bulletin, Inc., 372 F.2d 691 (9th Cir. 1967) 26
NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960) 23, 24
NLRB v. Lion Oil Company, 352 U.S. 282 (1957) 26
NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 28
NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) ..13, 14, 20, 23, 27
Thomas v. Collins, 323 U.S. 516 (1944) 25
United Mines Workers of America v. Pennington, 381 U.S. 657 (1965) 24

STATUTES:

National Labor Relations Act as amended (29 U.S.C. Section 151 et seq.):

Section 8(a)(5) 2, 3, 10, 12, 18, 24
Section 8(b)(3) 24, 27
Section 8(c) 11, 12
Section 8(d) 12, 26

MISCELLANEOUS:

93 Cong. Rec. 4135, 4363, 4581, 5005 24

2 Legislative History of the Labor Management Relations Act, 1947, 1062, 1172, 1244, 1479 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in the context of findings of twenty-six separate indicia of bad faith refusal to bargain, an employer, who was willing to enter into an agreement so long as it contained only the terms of its "take-it-

or-leave-it" offer, without good faith bargaining, either before or after its offer, and who was willing to meet and talk with the union, may be held not to have violated Section 8(a)(5) of the Act because the employer included in its offer everything it felt was warranted and right and expressed a willingness to change its offer if the employer could be satisfied that due to changed conditions or new facts its offer fell short of being right.

2. Whether the Board may consider as evidence of bad faith refusal to bargain, the employer's use, as a substitute for genuine negotiations with the union, of a massive communications program directed to its employees, which included misrepresentations of fact, threats of reprisal and promises of benefit, for the purpose not only of undercutting the union's bargaining position but also its authority as bargaining representative.

3. Whether, in finding that the totality of the employer's conduct constituted a violation of Section 8(a)(5), the Board properly relied upon evidence which established the complementary character of the employer's failure to make any effort to resolve issues at the bargaining table and its campaign among employees to disparage the union and to impose without substantial alteration the employer's offer.

4. Whether the bargaining order herein fairly apprises the employer of the conduct prohibited.

5. Whether, as one of numerous bases for entering a general order to cease and desist refusing to bargain in good faith, the Board properly determined that it was a *per se* violation of Section 8(a)(5) of the Act for the employer to offer to the union on a "take-it-

or-leave-it" basis a new accident insurance program and then refuse the union's request for bargaining with respect thereto for the asserted reason that both the employer and the union were parties to an agreement in which they waived their right to insist on opening the subject of insurance until a date which had not yet been reached.

6. Whether it was a *per se* violation of Section 8(a)(5) of the Act for the employer to refuse to furnish to the union cost estimates of contributory insurance and pension proposals offered by the employer, where the employer used such cost estimates in preparing its offer and insisted at the bargaining table that higher costs would jeopardize its business.

STATEMENT OF THE CASE

The Board's Finding of Fact

In the court below the petitioner made no attack on the substantiality of the evidence to support the Board's findings of fact. And, of course, it makes no such attack here. These findings of fact contain at least twenty-six indicia of GE's bad faith which in "totality" constituted the general violation of Section 8(a)(5) (C-9).[1] These findings are entirely ignored by petitioner in its framing of the questions which are allegedly presented for consideration by this Court. Rather, petitioner has isolated particular aspects of

[1] References to "C" followed by a number are to the Board's decision and the Trial Examiner's Intermediate Report as printed in Appendix C submitted by the petitioner with its petition for a writ of certiorari. References to "A" followed by a number are to the decision of the Court of Appeals for the Second Circuit as printed in Appendix A to the petition for a writ of certiorari.

GE's conduct which the Board and the court below did not consider apart from the rest of the facts. For even as to each of the *per se* violations, the Board in addition to the *per se* determination, also found bad faith. The following twenty-six indicia of GE's bad faith were found by the Trial Examiner, whose findings in these respects were adopted by the Board and affirmed by the court below:

1. "[A] deliberate design to undermine employee faith and confidence in the Union's leadership and in the efficacy of the collective bargaining process" (C-235-236). GE's "bargaining stance and conduct, considered as a whole, were designed to derogate the Union in the eyes of its members and the public at large" (A-40).

2. "[A] determination on its part to rely *entirely*" (emphasis the Trial Examiner's) on the effectiveness of its communications to employees "to achieve acceptance of its contract proposals", thereby "engaging in negotiation with an attitude that was one of evasion rather than fulfillment of its statutory obligation" (C-227, 229; affirmed, A-45-46).

3. "[A] conscious and deliberate purpose to play on the employees' fears and insecurities," which it carried out by threats of reprisal and promises of benefit, seeking to gain acceptance of its offer through coercing employees away from support of the Union's position (C-235-236, 247).

4. The announcement of its "fair, firm offer" which "amounted in effect to a unilateral determination of employment terms; leaving negotiations thereafter * * * an empty exercise with predetermined results" (C-220). The "take-it-or-leave-it approach ('fair, firm offer')

to negotiations in general * * * emphasized both the powerlessness and uselessness of the Union to its members" (A-40).[2]

5. Entry into the sessions preceding announcement of its "fair, firm offer" "without any intent to attempt to reach agreement" (C-214-215; affirmed, A-42).

6. Establishment and considering itself bound by the expressed policy of embodying its determination of what is "right" in a "fair, firm offer" unchangeable except on showing of a factual error or new facts and by the expressed policy of "uniformity" as to all the 100 odd unions representing its employees, which two policies were applied by GE "in conjunction" so that at the bargaining table GE made no attempt to reach agreement with the IUE but instead engaged in mere surface bargaining (C-219-220, 228, 240-241; affirmed, A-47 and fn. 15).

7. "[H]aste", in the circumstances of GE's "fair, firm offer policy" and its "uniformity policy", "to publicize its offer" which "reflected the want of an earnest effort on its part to seek through the processes

---

[2] The petition (pp. 9, fn. 5, 20) asserts that the record does not support the court's characterization of GE as making "take-it-or-leave-it-proposals" (A-40, 41, 46). Petitioner, as proof to the contrary, quotes the Trial Examiner as stating that GE did "not initially present its offer on an avowed 'take-it-or-leave-it' basis" (C-40). But the Trial Examiner starts off his next sentence with "It professes" (C-40), meaning GE professes, which establishes that the important word in the prior sentence was "avowed", that the avowal was mere profession, not actuality. And throughout the Intermediate Report (C-44-45, 215, 218-220) the Trial Examiner found GE had so committed itself to the offer that it could "not thereafter consider with an open mind proposed concessions, compromises, or other suggested solutions of differences" (C-218). The Board found that GE was less able to bargain than the usual take-it-or-leave-it employer (C-7).

of collective bargaining a possible basis for mutual agreement" (C-218; affirmed, A-45-46).

8. Refusal "to discuss freely and fully the respective claims and demands", and its refusal "to justify them in reason" but instead registering "impatience with the Union's efforts to have it justify its bargaining positions, and at times, when asked to do so, either refus[ing] or shift[ing] to other reasons which it stated in terms so vague or arbitrary as to stifle further meaningful discussion" (C-249; affirmed, A-42-43).

9. Communications to employees, which placed "a cost estimate on the Union's demands that it later declined during negotiations to justify to the Union" (C-228-229, fn. 129; affirmed A-10-12, 25-26).

10. Criticism to employees, in its communications prior to August 30, of the Union's demands "before first discussing them with the Union" (C-228-229, fn. 129).

11. Arguing as to some subjects "its positions more fully to employees than it did to the Union in the conference room" (C-228-229, fn. 129).

12. Communications to its employees, in which it "advanced arguments not only more full but different from those presented to the union negotiators at the bargaining table" (C-234).

13. "[O]ne-sided reporting to employees of the progress of the negotiation, while professing a purpose to keep employees 'fully informed' " (C-229, fn. 129, 230).

14. "[E]fforts through its massive communications program, which included misrepresentations of fact (footnote omitted), to discredit the IUE leadership in the eyes of the employees and otherwise to drive a

wedge between the Union and its members" (C-248-249).

15. "[A] virulent attack on the Union's election plans and on the motives and integrity of the IUE top leadership, containing in part misrepresentations of fact", a tactic which had been decided upon by GE "long in advance of the negotiations", reflecting "an attitude inconsistent with good-faith recognition and dealing with the Union" (C-232).

16. "The very massiveness of the communications program", which was "in itself a measure of [GE's] determination to deal essentially, not with the employees through the Union, but with the Union through the employees, evidencing * * * a purpose to undercut not only the Union's bargaining position, but its authority as bargaining agent as well" and showing "a frame of mind antithetical to simultaneous good-faith bargaining in the conference room" (C-231; affirmed, A-45).

17. "[B]ypassing the Union as national bargaining agent in an effort to deal directly with IUE locals on strike-truce terms," in a manner "incompatible with simultaneous good-faith dealing with the Union at the bargaining table" (C-248; affirmed, A-38).

18. "Bypassing" the Union by inviting and encouraging "employees to discuss directly with plant management questions they might have about the offer, and at one large plant" the holding of "a series of round-table meetings for that purpose" (C-230-231; affirmed, A-45).

19. "Bypassing the Union" and "contact" with IUE local officials "directed in an effort to persuade them to alter the time fixed for the balloting and the questions to be voted on" (C-232; affirmed, A-45).

20. Rejection on the eve of the strike of the "Union's request for a reduced committee, three on each side, to attmpt to work out differences so as to avoid a strike" (C-144, 250).

21. Insistence "on 'gold fish bowl' bargaining'" indicating "that it was infinitely more concerned with publicizing its positions directly to employees than *with making an earnest effort* to explore the possibilities of finding common ground" (C-250-251).

22. Refusal on October 14, "to produce its pension plan language until full agreement was reached" (C-251; affirmed, A-43).

23. Refusal on October 19, "to put on the table the complete agreement it was prepared to sign unless and until the Union first expressed its *unqualified* (emphasis the Trial Examiner's) acceptance" (C-251; affirmed, A-43-44).

24. The "flat refusal, not satisfactorily explained, to enter into a strike settlement agreement labeled as such, or one bilateral in form, and its insistence upon substituting a 'letter of intent'" (C-251; affirmed, A-44).

25. "[R]efusal to furnish the Union with relevant and necessary information" which "strongly supports a finding of overall bad faith" since it "was intimately bound up with its attitude * * * that its offer was not open to serious challenge, once presented" (C-248; affirmed, A-33-34, fn. 10, 41-43).

26. "[P]resentation of its personal accident insurance proposal to the Union on a conceded take-it-or-leave-it basis [which] constituted a rejection of the principle of collective bargaining * * * reflecting adversely on [GE's] general attitude toward collective bargaining" (C-123; affirmed, A-21-22).

The Board's Order

The Board's order (C-10, 258-262) is in the usual broad general form. GE was ordered to cease and desist from refusing to bargain collectively in good faith with the IUE (C-258). There is no affirmative bargaining order. Nor is there any specific provision in the order which reflects the *per se* violation found based on the avowedly take-it-or-leave-it presentation of the accident insurance program.

With respect to the *per se* violation based on refusal to furnish information, GE is ordered to cease and desist from "Failing or refusing, upon request, timely to furnish the IUE with information necessary or relevant to bargaining issues involved in national level collective bargaining" (C-259) and to take the affirmative action of furnishing IUE

> "(1) the cents per month premium, per employee, and also for employee dependents, of each insurance benefit improvement added to the Insurance Plan provided for in the 1960-1963 Agreement relating thereto;
>
> "(2) the estimated monthly average net cost per employee, and also for employee dependents, to the Company of each such insurance benefit improvement, computed from the cost estimates prepared and maintained by the Company for its own use in making calculations of that kind; and
>
> "(3) the estimated average cost in cents per hour per employee of each added increment in Pension Plan benefits provided for in the 1960-1963 Agreement relating thereto, computed from the cost estimates prepared and maintained by the Company for its own use in making calculations of that kind." (C-260)

The order (C-10, 258-262) contains no provision which by its terms limits or prohibits communications

to employees nor which requires the employer to alter its bargaining policy or in the alternative to refrain from communications to employees, despite the petitioner's phrasing its questions presented as if the Board had so ordered (Pet. p. 3). The only such limitation, prohibition or alteration which could ensue from the order arises solely from the direction to cease and desist from refusing to bargain collectively in good faith or in any like or related manner interfering with, restraining or coercing its employees (C-258-259).

The Decision of the Court of Appeals

All three judges of the court below agreed that by refusing to furnish cost information and in bypassing the IUE-GE Conference Board, GE violated Section 8(a)(5) of the Act (A-30-38, 55, 57). The majority of the court sustained the Board's order in full (A-54, 55).

One judge, dissenting only as to the Board's general order to cease and desist from refusing to bargain, expressed his view that "other specific conduct of the Company, such as that in regard to the effective date of the pension plan * * * and the form of the strike settlement agreement, * * * could properly have been condemned and an appropriate order framed" (A-57) but he disagreed with the Board's basing of its findings and order on GE's entire course of conduct. Although no specific provision in the Board's order rests on the *per se* violation based on the refusal of GE to bargain about its proposal to the IUE of an accident insurance program, the dissenting opinion expressed disagreement with the Board's determination of a *per se* violation in this regard (A-57).

The opinion of the court below stated that "the facts of this action demonstrate an absence of subjective

good faith" on GE's part (A-53). The court summed up GE's "take-it-or-leave-it" maneuvers by stating (A-41-42):

> "[T]he Board could appropriately infer the presence of anti-Union animus and * * * could reasonably discern a pattern of illegal activity designed primarily to subvert the Union. * * * GE displayed a patronizing attitude towards Union negotiators inconsistent with a genuine desire to reach a mutually satisfactory accord."

Willingness to sign a contract on GE's take-it-or-leave-it terms was not viewed by the court as inconsistent with finding that GE had no genuine desire to reach agreement. The court stated (A-51):

> " '[D]esire to reach agreement' may mean different things to different people, but in the context of a meaningful and purposeful reading of Section 8 (a)(5) it must mean more than a willingness to sign a piece of paper. The statute does not say that any 'agreement' reached will validate whatever tactics have been employed to exact it. To imply such a Congressional purpose would be to encourage parties to make their violation so blatant that it would be impossible for the other side to continue to exist without signing. Instead the statute clearly contemplates that to the end of encouraging productive bargaining the parties must make 'a serious effort to resolve differences and reach a common ground,' *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a 'predetermined resolve not to budge from an initial position'. *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (Frankfurter, J., concurring)."

Considering GE's free speech arguments, the court held that Section 8(c) did not bar the Board from

relying on GE's communications activities in determining that GE had violated Section 8(a)(5). Reviewing the applicable legislative history the court held that "the objective of Section 8(c) * * * was to impose a rule of relevancy" (A-48-49), that Section 8(c) was intended only to exclude speech when it was entirely unrelated to conduct. The court found that here the communications program was both interrelated and relevant (A-48-49). The court stated (A-45-46):

> "The Company's stand * * * would be entirely inexplicable without the background of its publicity program. Only when viewed in that context does it become meaningful * * * GE, the Trial Examiner found, chose to rely 'entirely' on its communications program to the virtual exclusion of genuine negotiations, which it sought to evade by any means possible. * * * The aim, in a word, was to deal with the Union through the employees, rather than with the employees through the Union.
>
> * * *
>
> "* * * [I]ts communications approach determined its take-it-or-leave-it bargaining strategy. Each was the natural complement of the other."

The tender of the accident insurance proposal accompanied by the absolute refusal to bargain with respect thereto, in the court's view, as in the Board's, was anti-union motivated (A-21, 22, 24) as well as a *per se* violation of Section 8(a)(5) (A-23-25). The court construed Section 8(d) as only designed "to protect the status quo" (A-19-21) and GE's offer of the accident insurance program admittedly disrupted the status quo (A-18, 24).

Similarly, the refusal of GE, during the course of negotiations, to supply the union with requested information as to the cost of GE's pension and insurance

proposals, in the court's view, as in the Board's (C-191, 248), constituted bad faith (A-33-34, fn. 10) as well as a *per se* violation (A-32-33). The court pointed out that the "cost information the Union wanted was put in issue by the Company's repeated references to cost as a justification for rejecting the Union proposals" (A-28) and that "GE had most of the information in some form that would have been useful to the Union" (A-33).

The generality of the order, being merely a direction to cease and desist from refusing "to bargain collectively in good faith with the IUE" (C-258), was held unobjectionable, relying upon the holding of this Court that "Once good faith is found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion." *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956) (Frankfurter, J., concurring) (A-54, fn. 19).

REASONS FOR DENYING THE WRIT

I.

NONE OF THE QUESTIONS STATED IN THE PETITION IS PRESENTED BY THE RECORD BELOW.

A. The premise of the First, Second and Third Questions that GE had a "genuine desire to reach agreement" is negatived by the Board's contrary finding which was sustained by the Court of Appeals.

The first question which petitioner alleges is presented relates to "an employer who has been found to have a genuine desire to reach agreement" (Pet. p. 2). And in its reasons for granting the writ, petitioner (p. 13) asserts that "This Company genuinely desired to reach agreement with the Union and the fact was so found (App. C-207)." The cited page of the Intermediate Report contains only a statement by the Trial

Examiner of GE's contention, not any finding by the Trial Examiner.

Neither the Board nor the Trial Examiner made the asserted finding. Instead, they found the opposite. The Intermediate Report contains repeated findings that GE participated in purported negotiation meetings "without any intent to attempt to reach agreement" (C-214-215, referring to the first four weeks of meetings with respect to employment security); that GE "was determined—certainly after the resumption of meetings on September 20—merely to go through the motions of bargaining in the conference room" (C-236); that GE's "haste to publicize its offer reflected the want of an earnest effort on its part to seek through the processes of collective bargaining a possible basis for mutual agreement" (C-218); and, referring to the entire period, that GE "considered itself bound by expressed policies or positions", namely its policy of a "fair, firm offer" and its policy of uniformity as to all 100 unions representing its employees, "that * * * reflect[ed] a cast of mind against reaching agreement' " (C-228).

The Board adopted all the foregoing findings and, quoting from *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring), stated that "good-faith bargaining means more than 'going through the motions of negotiating' " (C-4), that GE's course of conduct "scarcely evinces a sincere desire to resolve differences and to reach a common ground" (C-8).

The court affirmed all of the Board's findings in this regard and characterized the record as disclosing that GE had an attitude "inconsistent with a genuine desire to reach a mutually satisfactory accord" (A-42, 51-52).

The second and third questions as stated in the petition (p. 3) similarly adopt the premises of the first question stated. Without repeating the description of bargaining policy set forth in the first question, the second question adopts it by reference, using the phrase "this bargaining policy" in a context that could only have reference to the first question. Similarly, the third question refers to the "employer's bargaining policy", without further description.

Thus the first three questions pose legal issues not raised by the record below because they assume a state of facts the exact contrary of what the Board and the court below found.

B. The further premise of the First, Second and Third Questions, that GE met and conferred with the Union in furtherance of a genuine desire to reach agreement and engaged in a course of bargaining, is negatived by the Board's contrary finding.

The first, second and third questions as stated in the petition (pp. 2-3) are not only erroneously premised on the assumption that the employer had a genuine desire to reach agreement but in addition rest on the further erroneous premise that the employer for the purpose of carrying out that desire, met and conferred with the union and engaged in a course of bargaining. And in its reasons for granting the writ, the petition describes GE as having "met, conferred and negotiated" (Pet. p. 16) and as having engaged in "three months of negotiations during which the parties met and discussed each other's demands and proposals" (Pet. p. 13).

The Trial Examiner found that at no time during those months did GE actually negotiate with the IUE. With respect to the six weeks of meetings preceding

GE's presentation of its offer, the Trial Examiner found they were not negotiating sessions because GE made them mere "listening" sessions (C-214-216), stating "if any genuine bargaining were to occur, it had to begin at the time [GE's] offer was made" (C-217). With reference to the pre offer meetings the court agreed there was no bargaining (A-42). GE's offer when made was "unresponsive" to what transpired before (C-217, 220). In the context of its "fair, firm offer" and "uniformity" policy, by publishing its offer before any meaningful discussion of it with the IUE could take place, as the Trial Examiner (C-220), the Board (C-6-7), and the court (A-43-46) found, subsequent the meetings between GE and IUE constituted "an empty exercise with predetermined results."

C. The premise of the Second and Third Questions that GE's communications sought to influence employees in support of GE's bargaining policy, is contrary to the findings of the Board and the Court that GE relied exclusively on communications as a substitute for the bargaining which should have been but was not.

The second and third questions assume that GE's communications policy involved the issuance of views, opinions and arguments to employees in support of GE's bargaining policy (Pet. p. 3). In its reasons for granting the writ, the petition states that communications were condemned "not because they contained threats or promises of benefit but because they conveyed a policy of firmness in bargaining of which the Board disapproved" (Pet. p. 12).

Nothing in the decision of the Board or the court below suggests the slightest criticism of an employer presenting its views, opinions or arguments to em-

ployees to persuade them of its fairness. Rather the Trial Examiner, the Board and the court found that the GE's communications program constituted an attempt by GE to deal with the Union through the employees rather than with the employees through the Union, thus distorting the accepted approach (C-226-227, affirmed A-45); that GE's "communications program was such as to disclose a determination on its part to rely *entirely* (emphasis in original) on its effectiveness to achieve acceptance of its contract proposals" and that GE "was sitting out the negotiations while waiting for that program to have its corrosive effect" (C-227-229, affirmed A-45); that GE relied on its massive communications program "as a substitute for genuine bargaining" (C-231-232, affirmed A-45); and that GE was determined "merely to go through the motions of bargaining in the conference room and to rely entirely on the effectiveness of its direct 'sales' approach to employees to resolve the bargaining issues in its favor" (C-236; affirmed A-45-46).

D. The premise of the Second, Third and Fourth Questions that the Board's order attempts to regulate or limit freedom of speech has no basis in the Board's order.

The second question asks if the NLRB may "limit or prohibit" communications (Pet. p. 3); the third question asks if the NLRB may require an employer "to refrain from communicating" his bargaining policy to employees (Pet. p. 3); the fourth question asks how specific the order must be which attempts "to regulate or limit freedom of speech" (Pet. p. 3). The Board's order (C-10, 258-263) has no provision which by its express terms limits or regulates GE's communication to its employees other than the usual notice posting requirement common to all Board cease

and desist orders. Nor is there any provision which impliedly limits or regulates communications as such. Rather the order follows the conventional form of requiring GE to cease and desist from (1) refusing to bargain in good faith; (2) refusing to furnish necessary information; (3) bargaining directly with locals; (4) discouraging union membership; (5) in any like or related manner interfering, restraining or coercing (C-258-259). The affirmative action directed is (1) to furnish specified information; (2) offer certain named employees reinstatement; (3) make them whole; (4) make available records necessary for the computation of back pay; (5) post notices; and (6) notify Regional Director of compliance (C-260-262).

The second, third and fourth questions urged in the petition (p. 3) are not presented by the record below.

E. The Fifth Question relates to an issue which was not made the basis of any specified provision in the order but was one item among many which in totality support the general order to cease refusing to bargain in good faith.

Although the Board (C-2, and fn. 3, 56-60, 213) and the court (A-18-25) found that GE's refusal to bargain with respect to its proposed accident insurance program constituted both a *per se* violation of Section 8(a)(5) and an indicia of subjective bad faith, no specific provision in the order relates to these findings. Rather both the *per se* finding and the bad faith finding are merely one among at least twenty-five other findings of indicia of bad faith which in totality support the general order to cease and desist refusing to bargain in good faith (C-10, 258). Except for the direction to cease and desist refusing to bargain in good faith, no other provision in either the cease and

desist portion (C-10, 258-260) or the affirmative portion of the order (C-10, 260-262) is based on these findings.

In such a setting the issues relating to GE's refusal to bargain about the accident insurance program do not present a question for review by this Court.

F. The premise of the Fifth Question that GE's proposal of the accident insurance program constituted a benefit is not supported by the record.

The fifth question stated in the petition relates to an employer who voluntarily proposes "an added benefit to the union" (Pet. p. 3). There is no finding by the Trial Examiner, the Board or the court that GE's offer of its non-contributory insurance program constituted in any respect a benefit. Rather the Trial Examiner's description of the proposal emphasizes its detrimental features: the employees would pay the entire cost; the union's claim that the rates were too high and that it would prejudice the opportunity to negotiate improvements when contract negotiation time arrive (C-57-58). The court rejected as "illusory" GE's contention that it was offering a benefit and explained why (A-21).

Hence if any issue relating to GE's refusal to bargain about the accident insurance program is presented by the record below for review by this Court, it is not here in terms of a finding that a benefit was proposed, as the fifth question framed by the petition (Pet. p. 3) assumes.

G. The premises of the Sixth Question that GE did not plead inability to pay and that the cost of changes in pension and insurance plans was too speculative and conjectural for disclosure are negatived by the Board's contrary findings which were sustained by the Court of Appeals.

The sixth question relates to "an employer who has not pleaded inability to pay" (Pet. p. 4). The Board found that GE based much of its justification for its offer on "the asserted jeopardy to the success of its business and to employee jobs that any enlargement of the costs of its offer would entail" (C-187-188, 235). The court agreed that GE had put costs in issue by rejecting union demands as "astronomical" or "costly" (A-25-28, 33). GE misreads *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) in asserting that the case limits the duty of an employer to disclose to instances "where the employer mechanically repeats an argument of inability to pay" (Pet. p. 36 fn. 46). This Court used the expression "mechanically repeats" not to suggest that any one form of putting cost data in issue was required but rather to emphasize the hollowness of a claim asserted, as here, "without making the slightest effort to substantiate the claim" (351 U.S. at p. 153).

The sixth question is further premised on the assumption that the information which GE could have given the union about the costs of GE's own offer of pension and insurance benefits was "necessarily speculative and not matters of fact" (Pet. p. 4). This ignores the Board's finding (C-189-190):

> "But, estimates are not 'speculative' except in the loosest sense of the term, simply because they are estimates. And particularly is this so where the estimates are based on the application of actuarial standards as in the case of pensions and insurance.

> In composing its offer the Company considered the cost estimates prepared by its experts as sufficiently reliable for it to support a business judgment thereon. The Company was not being asked to guarantee that future experience would prove its cost projections accurate. The fact that the estimates might be subject to a possible margin of error neither destroyed their value to the negotiators nor excused their withholding."

The court agreed (A-33):

> "GE had most of the information in some form that would have been useful to the Union, and easily could have either presented it in that form, or at least advised the Union that it had other relevant information * * * available."

The sixth question as framed in the petition is not presented by the record below.

II.

ALL OF THE HOLDINGS OF THE COURT BELOW TURN ON GE'S SUBJECTIVE BAD FAITH AND HENCE PRESENT NO ISSUE OF LAW FOR REVIEW OF THIS COURT.

We believe that none of the questions urged upon this Court by the petition (pp. 2-4) is presented by the record below. To the extent that any of the issues suggested by these questions may seem worthy of review, we wish to emphasize to the Court their intertwinement with the subjective bad faith findings to such an extent as to make all these issues essentially factual rather than legal. Both the Board (C-7-9, 212) and the court below viewed all the conduct of GE, which was found by the Trial Examiner, as part of an overall "pattern of illegal activity designed primarily to subvert the Union" and motivated by "anti-Union animus" (A-41).

In their rulings on each of the issues which may inhere in any questions presented, both the Board and the court carefully delineated the subjective bad faith aspects of GE's conduct.

The course of dealing between the parties which petitioner would defend as constituting good faith bargaining was attended by the twenty-six indicia of bad faith listed in our statement of the Board's findings of fact (pp. 4-8, *supra*). Subjective bad faith consisted in part of entering into the pre offer meetings "without any intent to attempt to reach agreement" (C-214-215), making an "unresponsive" offer (C-217, 220) and then going through post offer negotiations as "an empty exercise with predetermined results" (C-220). GE engaged "in negotiations with an attitude that was one of evasion" (C-227). The court summed these up as demonstrating "an absence of subjective good faith" (A-53).

The Board found GE's communications were further evidence of bad faith. "The tactic of attacking the motives of the IUE leadership had been decided upon as a communications approach long in advance of the negotiations" (C-73, 232). The communications contained "misrepresentations of fact" (C-61, 66, 70, 83, 96, 107-108, 115, 150, 232, 248), threats of reprisal and offers of benefits (C-129-131, 156-157, 235, 247). They reflected "a conscious and deliberate purpose to play on employees' fears and insecurities" (C-235).

The Board found that GE's presentation to the union of an accident insurance proposal and then refusing to bargain about it reflected "adversely on [GE's] general attitude toward collective bargaining" (C-213). The court below characterized GE's conduct with re-

spect to the accident insurance proposal as "clearly designed to show the employees that the Union could win them nothing more than the Company was prepared to offer" (A-21-22).

Even with respect to the failure to supply information requested by the union, the Board (C-248) and the court below (A-33-34, fn. 10) each found the refusal was motivated by subjective bad faith.

In view of the foregoing findings we submit that none of the questions tendered by the petition is presented by the record below as a legal issue as contrasted with a factual issue.

III.

NONE OF THE HOLDINGS OF THE COURT BELOW IS IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OF THE COURTS OF APPEALS.

All of the claims of conflict with decisions of this Court and other courts of appeals made in the petition (pp. 14-35) rest on the same false assumptions as to the facts in the instant case as characterize the framing of the questions presented.

The claimed conflicts with *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952) (Pet. pp. 13, 18), *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 488-489 (1960) (Pet. pp. 14, 17, 19, 20, 25) and *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (Pet. pp. 16, 36), rest, as is apparent from the petition, on the false assumption that here GE had a "sincere desire to reach agreement" (Pet. pp. 14-15, fn. 12, 16) and did nothing to "frustrate agreement" (Pet. pp. 16, 17), whereas both the Board and the court found GE had no intent to reach agreement (see pp. 14-16, *supra*).

Petitioner (Pet. pp. 16-17, 24, 25) relies heavily on *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 665 (1965) for the proposition that this Court recognized area standards or pattern bargaining as valid. There this Court held that the union "may * * * seek to obtain the same terms" from all employers, adding in footnote 2 that "Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it". The *Pennington* case arose under anti-trust legislation and presented no issue with respect to the duty to bargain collectively. The Court at no place suggested that in pursuing area standards the union was relieved of good faith bargaining with each employer. The Board has held that a union is guilty of a refusal to bargain where it attempts to impose area standards without good faith bargaining with an employer. *International Brotherhood of Electrical Workers and Phil Sears,* 9-CB-1455, etc., decided January 28, 1970 (DLR 2/4/70 p. A-9). As this Court pointed out in *NLRB* v. *Insurance Agents Int'l Union,* 361 U.S. 477, 487, 506, fn. 3 (1960) the legislative history of the Labor Management Relations Act discloses that Congress aimed Section 8(b)(3) primarily at such take-it-or-leave-it tactics by unions. 93 Cong. Rec. 4135, 4363, 4581, 5005; 2 Leg. His. LMRA 1947, 1062, 1172, 1244, 1479. Nothing this Court stated in *Pennington* indicates that pure take-it-or-leave-it tactics satisfy Section 8(a)(5) or 8(b)(3).

Nor does the recognition by this Court that "it is not the announced posture of the parties but rather their relative bargaining strengths which determines whether and to what extent they will yield" (Pet. p. 25), indicate that the strength of either party may be

used to impose a contract without good faith collective bargaining.

With respect to the claimed conflict with free speech decisions, *Thomas* v. *Collins,* 323 U.S. 516, 532 (1944) (Pet. pp. 27-28), *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, 62 (1966) (Pet. p. 28), *Coppus Engineering Corp.* v. *NLRB,* 240 F.2d 564 (1st Cir. 1957) (Pet. pp. 28-29) and *NLRB* v. *Colvert Dairy Products Co.,* 317 F.2d 44, 46 (10th Cir. 1963) (Pet. p. 29), petitioner's contention is based on the same erroneous view of the findings of fact herein as we have already set forth in showing that the questions stated in the petition with respect to GE's communications program are not presented by the record in this case (pp. 16-17, *supra*). Here GE's communications in addition contained misrepresentations, threats of reprisal and promises of benefit (see p. 22, *supra*). Nothing in any of the cases cited suggests such communications are protected free speech.

Even if a conflict with *General Electric Co.* v. *NLRB,* 412 F.2d 512 (2d Cir. 1969), existed, since that decision was by the same court of appeals as the instant case, this does not constitute the conflict between circuits which calls for resolution by this Court. Moreover, the earlier *GE* decision is not in conflict with this one. The issue in the earlier *GE* case was whether, when GE had agreed with the union to begin negotiations prior to the date required by law, GE could make its discretionary participation in such early negotiations conditional on exclusion from the union's bargaining committee, for the discretionary meetings, of all members or representatives of other unions. The court of appeals held GE could so condition its discretionary participation in early negotiations.

Here GE by proposing a new accident insurance program, opened the subject of accident insurance during the time when by contract terms it was not open for negotiations. By opening the subject and then refusing the union's request to bargain on GE's own proposals, GE insisted on its right to make a unilateral decision respecting accident insurance without collective bargaining. The earlier decision involved no element of GE's effort at unilateral imposition of substantive terms without bargaining with the union but solely went to the propriety of GE's procedural limitation that if it was to meet before in law it was required to meet, it would meet only with the union's regular committee rather than one enlarged by the addition of persons with affiliation with other unions. The two issues are totally unrelated.

NLRB v. *Lion Oil Company*, 352 U.S. 282 (1957) (Pet. p. 35) does not suggest that an employer who seeks to disrupt the status quo during the term of a contract, can do so without willingly accepting the union's request for bargaining. In *Lion Oil* this Court had before it a contract which permitted a reopening for modification during the term of the contract. This Court, recognizing the uselessness of negotiations without a power to resort to economic sanctions, held that the union, after giving the 60 day notice required by Section 8(d), could strike in support of its modification proposal.

And in *NLRB* v. *Honolulu Star-Bulletin, Inc.*, 372 F.2d 691 (9th Cir. 1967) (Pet. p. 35) the court merely held that a union could not insist on the employer's bargaining about a bonus when, during the term of a contract which foreclosed bargaining about that subject for the duration of the contract, the union requested

the company so to bargain. Here it was the employer that wanted to institute a new accident insurance program. The *Honolulu Star* ruling would absolve the union of an 8(b)(3) if it had refused to bargain about the accident insurance proposal. That ruling has no applicability when it is the employer who proposes a change, the union requests bargaining, and the employer refuses to bargain.

The claim of conflict with the principle requiring specific and objective standards, for which the petition (p. 31) cites *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963) confuses the requirements of criminal statutes with those of equity decrees. The cited case dealt, and the quoted portion of the opinion is concerned, only with criminal statutes. Under the National Labor Relations Act it is well established that once bad faith bargaining is found a decree requiring good faith bargaining is sufficiently definite. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 432 (1941); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956); *NLRB* v. *Celotex Corp.*, 364 F.2d 552, 554 (5th Cir., 1966), cert. denied, 385 U.S. 987. As the court below stated "before a court would undertake to cite either a union or an employer for contempt, it would afford the party every opportunity to show that it was not contumacious and had made a good faith effort to comply with the terms of the bargaining order" (A-54, fn. 19).

IV.

THE DECISION BELOW IS CORRECT AND PRESENTS NO ISSUES REQUIRING REVIEW BY THIS COURT.

Given the twenty-six indicia of bad faith bargaining (see pp. 4-8, *supra*), which rested on findings which are not contested in the court below, the decision below was clearly correct and presents no issue for review

here. This Court has pointed out that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case" and hence particular factual applications call for the Court's "usual rule of non-interference where the conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 410 (1952); *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). The instant case turns entirely on its particular facts. It does not deserve review by this Court.

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING ABRAMSON
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Attorneys for Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO

February 9, 1970

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
1. Background	3
2. The preliminary meetings in early 1960	5
3. Negotiations during July and August of 1960	7
4. GE's offer and the negotiations in September 1960	10
5. The strike, and the Union's eventual surrender	18
B. The Board's conclusions and order	20
C. The decision of the court of appeals	21
Argument	22
Conclusion	31

CITATIONS

Cases:

Darlington Mfg. Co. v. *National Labor Relations Board*, 397 F. 2d 760, certiorari denied, 393 U.S. 1023 — 28

Equitable Life Insurance Co., 133 NLRB 1675 — 28

IBEW and Phil Sears Electric Service, TXD–712–69, Case No. 9–CB–1445, adopted by NLRB January 28, 1970 — 22

376-292—70——1

Cases—Continued Page
Linn v. *Plant Guard Workers*, 383 U.S. 53 28
National Labor Relations Board v. *American National Insurance Co.*, 343 U.S. 395 23
National Labor Relations Board v. *Insurance Agents' Union*, 361 U.S. 477 23, 24
National Labor Relations Board v. *Katz*, 369 U.S. 736 23
National Labor Relations Board v. *Truitt Mfg. Co.*, 351 U.S. 149 20, 30
United Mine Workers v. *Pennington*, 381 U.S. 657 22
Statutes:
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):
Section 8(a)(1) 20, 28
Section 8(a)(5) 20, 28
Section 8(c) 27
Section 8(d) 27, 28, 29
Miscellaneous:
Cox, *The Duty to Bargain In Good Faith*, 71 Harv. L. Rev. 1401, (1958) 23
Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948) 27

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A77) was issued on October 28, 1969, and is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. C) are reported at 150 NLRB 192.

JURISDICTION

The Company's petitions for rehearing and rehearing en banc were denied on December 2, 1969, and the judgment of the court of appeals was entered on the same date (Pet. 2; Pet. App. A78–A79). The petition

for a writ of certiorari was filed on January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer has bargained in bad faith, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, where the totality of circumstances indicate that it has in effect adopted a "take-it-or-leave-it" attitude with respect to its contract proposals and has hardened that attitude by a publicity campaign emphasizing their non-negotiability.

2. Whether an employer violates Section 8(a)(5) and (1) of the Act by offering to make additional accident insurance coverage available to its employees on its own terms during the term of a collective bargaining contract and refusing to bargain with the union about the matter until the contract comes up for renegotiation.

3. Whether an employer violates Section 8(a)(5) and (1) of the Act by refusing to furnish the union during collective bargaining negotiations with information concerning the cost of insurance and pension improvements offered by the employer, although the information was in the employer's possession and was relevant and necessary to the performance of the union's collective bargaining function.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. B1–B6.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BACKGROUND

This case arises out of the 1960 negotiations between the International Union of Electrical, Radio and Machine Workers, AFL–CIO ("IUE" or "the Union") and General Electric Company ("GE" or "the Company") for a new collective bargaining agreement. In 1960, the IUE represented a substantial majority of GE's unionized employees (Pet. App. C31).[1]

The general approach which the Company took in the 1960 negotiations had been conceived in 1947, chiefly by Vice-President Lemuel R. Boulware, in an effort to avoid repetition of the result of a 1946 strike which had been broadly supported by GE employees, and was highly successful (Pet. App. C37–C38). The new approach called for GE to apply its product marketing skills to employment relations. It was to engage in extensive year-round research into business conditions, competitive factors, and employee needs and desires. On the basis of its evaluation of

[1] Since the 10,000 pages of hearing transcript and the additional thousands of pages of exhibits which comprise the record in this case were not reduced to a printed appendix below, the references herein are to the factual findings of the Trial Examiner. These were adopted by the Board, were accepted by the court of appeals, and are not disputed in the petition for certiorari. Where references would be unduly repetitious, a single reference has been inserted at the end of a paragraph.

all the facts, the Company would, "at the proper time," present to the unions with whom it dealt a "fair, firm" contract offer—one which contained all that GE had found to be warranted, with nothing held back for later trading or compromising. Although the Company professed a willingness to make prompt adjustments whenever new information or a significant change in facts indicated that its offer fell short of being "right," it believed that if its research were complete and accurate there would be no need to change the offer, save in exceptional circumstances (Pet. App. C38–C41).

The Company also decided that it was important to treat all of its employees uniformly. Accordingly, it would not only prepare and present similar offers to all unions representing its employees, but also would guarantee to nonrepresented employees the same pay and benefit programs that would be available to the represented employees (Pet. App. C43–C45).

Finally, GE decided to use a wide variety of communications media—newspapers and plant bulletins, letters to employees, television and radio, speeches by Company officials, and even informal conversations between employees and their immediate supervisors—to "market" management positions directly to employees on a year-round basis and also to obtain "feedback" from the employees. As contract negotiations approached and while they were in progress, GE would intensify its communications program in

an effort to explain its position to the employees and to persuade them to choose it over that of the unions. In particular, the communications would seek to emphasize to both employees and union representatives that, since the Company had "voluntarily done right," there could be no profit in a show of force; management would not change its offer simply because of a threatened or actual strike, and would "take" a strike of any duration to resist doing what it considered to be "wrong" (Pet. App. C40–C42).

2. THE PRELIMINARY MEETINGS IN EARLY 1960

Under the 1955 contract between GE and the IUE, the earliest date that either party could compel the beginning of negotiations for a new contract was August 16, 1960, 45 days before the terminal date (Pet. App. C45, C54). Early in 1960, Vice-President Parker and Union Relations Manager Moore toured GE plants around the country to emphasize to local officials and supervisors that the Company's success in negotiations would depend on "the communications that you are doing—both written and oral—and the man-to-man communications relationship that you have built up * * *" (Pet. App. C51–C54). Company and Union officials met informally on January 26, 1960, and thereafter in regard to compiling a common body of information (Pet. App. C54–C55). The Union suggested that actual negotiations should begin well before the mid-August date, and GE eventually agreed to meet with Union representatives on June 13, 1960,

solely for the purpose of hearing the Union's presentation and explanation of its contract demands (Pet. App. C55).

When the parties met on June 13, the Company's reactions to the Union's proposals were that they were "ridiculous," "astronomical" in cost, and not designed for an early settlement (Pet. App. C60–C61). The June 13 meeting also produced a clash over the Union's demand for bargaining about a Company offer—made by letter on June 1—to provide additional accident insurance coverage as of July 1 to employees who desired it and were willing to pay the full cost. This coverage went beyond that provided on a contributory basis under the current contract. The Company insisted that the matter was not bargainable, at least until the start of formal negotiations on a new contract, and that the Union's only option at this time was either to accept the offer, which had already been publicized to the employees, or to reject it. The Union objected to the Company's refusal to bargain about the insurance offer, and decided to reject it. The Company proceeded to make the additional insurance available to employees who were not represented by the IUE, as it had indicated it would do (Pet. App. C56–C59).

Thereafter, the parties agreed that bargaining sessions would start July 19 on the subject of employment security, and that four weeks would be devoted to an effort to reach agreement on this matter. It was understood that, if such agreement were reached prior

to August 16, the parties would move on to other subjects; if, however, no agreement were reached by then, employment security would remain open for negotiation along with all other contract matters (Pet. App. C65–C66).

Meanwhile, GE began to attack the proposals which the Union had thus far presented. The Company reprinted in its plant newspapers articles from other sources which were highly critical of the Union's demands, including one which inaccurately estimated their cost at a half-billion dollars for the recognized employees alone. And, in a July 1 newsletter for supervisory personnel and community leaders, the substance of which was later repeated in numerous communications directed at the employees, GE asserted that the IUE's demands would add more than $500,000,000 to its total employment costs in the next two years, would harm the Company's assertedly precarious competitive position, and could eventually "destroy thousands upon thousands of jobs" (Pet. App. C61–C64).

3. NEGOTIATIONS DURING JULY AND AUGUST OF 1960

Between July 19 and August 11, 1960, the Company and the Union held twelve meetings on employment security (Pet. App. C74–C75). A key Union demand was establishment of a plan for payment of supplementary unemployment benefits (SUB), but it also made proposals relating to subcontracting, overtime work, automation, transfer of employees to

new plants, and separation pay (Pet. App. C75). GE refused to agree to the Union's SUB plan or to any of its other employment security proposals (Pet. App. C75–C77). When Union negotiators asked what the Company was prepared to do in this area, the response was that GE did not have its proposals ready, that it wanted its negotiators to have more information, and that it would present proposals at an unspecified "appropriate time * * * after we have explored everything and heard from local management" (Pet. App. C77–C78). The Company then devoted five bargaining sessions to lengthy prepared oral presentations from local Employment Relations Managers (Pet. App. C78). The Union complained that these sessions were a waste of time since the information could have been submitted in writing (Pet. App. C80). It further objected to the Company's refusal to permit the Employment Relations Managers to answer questions as to the desirability and practicality of applying the Union's specific employment security proposals at their respective locations (Pet. App. C79–C80). The negotiating sessions concerned exclusively with employment security concluded on August 11, with another prepared GE presentation, this time on the general causes of employment instability. The Company gave no indication of the proposals it was eventually to make, and was then contemplating, on the issue of employment security (Pet. App C79, C81–C82). As one GE publication admitted, despite the prior agreement to bargain (*supra* pp. 6–7), "There was no intent on the part of the Company to reach

an 'agreement' or solution to this complex problem during the initial four weeks of talk" (Pet. App C83).[2]

In the meetings between August 16 and 25 on the Union's overall contract demands, the pattern was much the same as that in the earlier sessions on employment security. Thus, the Union presented its justifications in support of its economic and other proposals, and the Company criticized and commented, but refused to agree to any of the Union's requests or to submit proposals of its own. The Company made clear that its eventual offer would be insufficient to cover the Union's economic demands, would be "thinner" than offers made in previous years, and would eliminate the cost-of-living escalator clause which had been part of the prior contract. However, when the Union asked GE to reveal how much it had available for its entire package so that the Union might suggest how that amount should be apportioned, the Company declined to do so. Nor was the Union able to learn from GE what the Company

[2] While GE held back at the bargaining table, its plant publications carried accounts of the negotiations, often daily, which were based on teletyped summaries sent from Company headquarters (Pet. App. C69–C70). These accounts—as the Trial Examiner described them—"were slanted in the Company's favor, sometimes presented the Company's arguments to the employees more fully than the Company did at the bargaining table, frequently failed to present the Union's position at all, * * * when stating the Union's contentions, often did so in a manner so abbreviated or editorialized as to give an inaccurate or unfavorable impression of the Union's position on the issues * * *," and "at some plants, * * * [untruthfully] purported to provide the employees with a *full* account of what occurred in the conference room" (Pet. App. C70).

thought the Union's demands would cost, even though the Company had characterized them as "astronomical" and had complained about the expense of certain items in particular. The Company asserted that it "never attempted to put costs on each of these items because we talk about the level of benefits that our package has" (Pet. App. C84–C87; and see also pp. 457–458, 460, 464–465, 476, 482, 596, 627, 630, 636 of the Negotiating Minutes, General Counsel's Exh. 2B).

4. GE'S OFFER AND THE NEGOTIATIONS IN SEPTEMBER 1960

On August 29, two ranking Union officials met informally with Company representatives and received a preview of the offer which GE planned to present the next day to the IUE and other unions (Pet. App. A88–A91). The Union officials protested that it was not responsive to the Union's proposals, and urged that formal presentation of the offer and its release to the press be delayed until the Union had a chance to examine it and suggest changes (Pet. App. C91–C92). GE refused to postpone presentation to the full IUE committee, but agreed to delay presentation of the offer to other unions and its release to the public. At the IUE presentation on August 30, the Union officials again protested the Company's lack of responsiveness to the Union's proposals, but suggested that the GE offer could serve as a basis for discussion during the next three days if there were no publicity. The Company responded that it had not held back anything and that the employees should know what was on the table. At the opening of the negotiating

session on the following day, the Company announced that its offer would be released to the public forthwith (Pet. App. C92–C94).

With release of the offer, the Company embarked on an elaborate and well planned campaign to sell its proposal to the employees. The Company deluged the employees at some plants with at least one and sometimes as many as three or four messages a day. Plant meetings featured slides, tape recordings, prepared scripts, and question and answer sessions. The Company's communications emphasized that GE's offer was "right," that no more could be given without endangering the future of the business and the jobs of employees, and that a "long pay-losing strike" was likely to result unless the offer was accepted. Also, the motives and tactics of the Union's leaders were attacked as being at odds with the best interests of the employees (Pet. App. C71–C72, C94–C103, C110–C111, C112–C120, C125–C132).

At the bargaining table, the Company adhered to its offer as presented to the Union on August 30 (Pet. App. C102–C103, C106). When the Union sought to ascertain the estimated cost of that offer, the Company's chief negotiator, Moore, replied that he did not know the cost "because it hasn't occurred yet," and that the Company had not put a figure on its package. The Union expressed disbelief that Moore did not know the cost of the GE offer, whereupon he again denied having any such estimate and explained, "GE works on a level of benefits basis, not the cost per item." In fact, however, the various items in the Com-

pany's proposal had all been cost-estimated by management representatives on a Company-wide basis prior to release of the GE offer (Pet. App. C104). Moreover, Company negotiators frequently cited cost as a consideration in rejecting Union demands, as for example with regard to improved maternity benefits, the length of the contract, supplemental unemployment benefits, continuation of the cost-of-living escalator clause, and the effective date of pension plan changes (Pet. App. C137–C138).[3] Indeed, GE repeatedly emphasized, both in its publicity and at the bargaining table, that "[a]ny increase in cost will make us less competitive" and that it was worried about the impact of competition, particularly foreign competition, on its operations (See Negotiating Minutes, General Counsel's Exh. 2B, p. 1118).

The Union encountered the same tactics when it claimed that the wage increase proposed by the Company was inadequate and that worker productivity justified a higher amount. The Company replied that "there is no direct relationship of productivity to wages," but refused to indicate the factors that had influenced its wage offer. When pressed on the matter,

---

[3] Note the following bargaining table exchange (Pet. App. C105):

> Swire [Union]: We are asking for an improvement in maternity. We want the Company to pay everything up to $550, then co-insurance after that.
>
> Willis [Company]: Something like that is out of reach. Maternity is the most expensive item.
>
> Swire: What does it cost, Sid?
>
> Willis: We talk level of benefits, not costs.

Company negotiator Moore stated that other wage settlements had a bearing, but then declined to go into particulars because the information was in the "public domain"; he added that Union representatives should have prepared themselves on this before the meeting. Ultimately, Moore declared that "[t]he wage increase justifies itself," and "[w]e bargain on what is the appropriate thing to do and the level of benefits" (Pet. App. C105–C106).

Similarly, the Union sought to change the effective date of the pension and insurance plan improvements from January 1, as proposed by the Company, to October, the contemplated starting date of the new contract. The Company first argued that the earlier date would be too costly, but, when the Union asked how much the difference would be, it retreated to the "we talk level of benefits" refrain. Next, GE argued that prior contracts had always provided for pension increases on the first of the year. When the Union demonstrated this was untrue, one GE negotiator promised to "consider" the October date. Later that same day, however, this concession was withdrawn. GE's subsequent explanations for the January 1 date were, "it's the beginning of the year * * * the time you make all the resolutions for the New Year's," and, "We think it is the appropriate date" (Pet. App. C138–C140; and see Pet. App. A12–A13).

On September 22, the Union made a further effort to obtain information relevant to the bargaining issues from the Company by requesting in writing that GE supply it with data indicating the cost per employee

in IUE bargaining units of the pension insurance improvements proposed by the Company, the number of employees involved in layoffs and recalls, and the number of employees with 20 and 25 years of continuous service. The layoff and recall information was desired so that the Union could evaluate the likely impact of an Income Extension Aid plan proposed by the Company; the 20 and 25 year continuous service information was needed to test the Company's assertion that an extra week of vacation after 20 years would be too expensive, but an extra week after 25 years would be acceptable if the Union were willing to forego a portion of the wage increase proffered by GE. On various occasions prior to its written request, the Union had orally requested similar information from the Company without success. For example, on September 8, the Union had asked how many employees would have benefited over the past 2 years from the Company's proposed Income Extension Aid plan had the plan been in effect then. The Company's chief negotiator replied, "Somewhere between zero and 100%," and another GE negotiator suggested that the Union should request the information in writing if it really wanted to know. But, even after receiving the Union's written request on September 22, the Company refused to submit the pension and insurance cost data; it took no active steps to collect the other information until after the end of the strike, when it no longer had any value in the negotiations. GE readily and without undue burden could have provided the Union with the requested information in a

form that probably would have been acceptable to the Union (Pet. App. C104–C105, C176–C194; and see Pet. App. A27–A33).

In accordance with the schedule agreed to in July, talks recessed in mid-September to permit the Union's negotiators to attend the IUE convention in Florida (Pet. App. C66, C132). Just as the Union's negotiators were about to leave for the convention, GE made the first change of any significance in its offer of August 30; it proposed giving the Union the option of substituting an extra holiday and a fourth week of vacation for employees with 25 years of service, for 1% of a previously proffered 4% mid-contract wage increase (Pet. App. C108–C109, C221–C222).[4] The Company proposed this modification even though the Union had already indicated that such a substitution would be unacceptable because the GE wage offer was too low as it was. The proposal was publicized to the employees before further bargaining about the matter could take place (Pet. App. C104–C111).

As the October 1 expiration date of the existing contract approached, GE openly assumed an increas-

---

[4] On September 8, the Company had also offered to make its proposed wage increase effective on Monday of the week a new contract was signed instead of October 2, as originally proposed. The Union had not asked for this change, and Company negotiator Moore indicated that he did not expect the Union to accept it because "you are going to the convention." The Company offered the early signing bonus to other unions as well, and then later told the employees in its communications that the Union was deliberately "stalling" negotiations and depriving its members of the benefits of an early settlement (Pet. App. C107).

ingly intransigent posture. In its publicity to the employees, it continued to argue the merits of its offer, occasionally departing from positions taken at the bargaining table (Pet. App. C125–C128).[5] And, after the IUE convention had recommended the scheduling of a strike vote, GE's communications began to concentrate on the futility of a strike because "[t]he Company has offered *everything* that appears to be right * * * and will not 'up' the offer because of strike threats or strike action" (Pet. App. C117); "everything that we are going to propose is on the bargaining table now, and there is simply nothing more to come" (Pet. App. C118). The Company also sent letters to local Union officials proposing to alter the date of the strike vote, the places of voting, and the wording of the ballot. Newspaper advertisements indicated that a strike threatened employment security and, at some plants, specifically warned of loss of jobs and promotions and of plant closings (Pet. App. C112–C116, C126–C130). The Company's stated view was that the "real scene of negotiations [had] shift[ed] from New York to all IUE represented plants * * * [where] the eventual outcome will be decided—quite properly—and quite soon" (Pet. App. C112).

---

[5] For example, despite its "level of benefits" approach at the bargaining table, at Schenectady the employees were informed that a fourth week of vacation for 20-year employees would represent "a very sizeable increase in costs * * * and we just don't dare incur the extra cost with the uncertain future that faces us at this time" (Pet. App. C127–C128).

Meanwhile, at the bargaining table, the Company's chief negotiator advised the Union on September 21 that GE's position was "firm" and "fixed"—"[c]ome October 2, Thanksgiving, Christmas, Easter, it won't be any different * * *" (Pet. App. C118). This point was confirmed by Company directives issued on September 20, 22 and 23, authorizing its operating managers to make effective for nonrepresented employees, retroactive to September 12, the wage increase which had been offered to the IUE and the other unions. The Company also committed itself to put into effect for the nonrepresented employees various other portions of its offer. Aware of the Company's policy of treating represented and nonrepresented employees uniformly, the Union asked Company negotiators whether the directives "will inhibit you from making any modification to the arrangements that you proposed for us." The Company replied it was "a factor" that GE had "to take into consideration" (Pet. App. C120–C125).

Thereafter, one Union negotiator, seeking to explore "a possible chance of changing the proposal * * * within the framework of the cost" and finding himself frustrated by the Company's response, asked GE negotiators whether at this point they could so much as "even dot an 'i' or cross a 't' * * *. It is all on the table. Is there any chance of changing your positions one iota?" Company negotiator Moore replied, "* * * after telling the employees before they went to vote that this is it, we would look ridiculous to change it at this late date; and secondly the answer is no. We aren't changing anything come

a strike or high water." Another Company representative then indicated that, with a strike threatened, GE would "look * * * foolish in the eyes of our people and of the country" if it changed its offer in the final stages of negotiations (Pet. App. C140–C147; see also p. 1246 of the Negotiating Minutes, General Counsel's Exh. 2B).

5. THE STRIKE, AND THE UNION'S EVENTUAL SURRENDER

The Union struck on October 2, after the Company had turned down a proposal by Federal mediators, which the Union favored, for an unconditional extension of the present contract while bargaining continued for a new contract (Pet. App. C146–C147). At Schenectady, where the IUE Local did not join the strike until October 6, and at Pittsfield, where the Local was already on strike, GE representatives offered strike truce terms to the Local Union officials which had not been offered to the IUE's national negotiators. Thus, GE promised the Schenectady and Pittsfield locals that, if their members remained or went back to work, it would retain in effect all provisions of the expired contract, except for the cost-of-living escalator clause. Only after the IUE filed unfair labor practice charges against the Company, on October 4, did GE make the same terms available to the Union's national negotiators, who then rejected them. Despite this rejection, the Company persisted in urging local Union officials at Lynn, Bridgeville, Waterford, and Syracuse separately to accept its strike truce proposals (Pet. App. C148–C154, C194–C206, and see Pet. App. A34–A39).

Meetings between the parties continued during the strike, but all attempts by the Union to induce GE to modify its position proved futile, as did the efforts of Federal mediators to find a compromise basis for settlement. On October 19, after rejecting still another Union proposal, the Company announced "we are at a legal impasse * * * and we see no useful purpose being served by further meetings with the Union at this time * * *" (Pet. App. C158). That same day, the Union indicated its willingness to capitulate, and, on October 22, signed a short memorandum of settlement accepting the Company's offer (Pet. App. C161, C167). That offer, substantially unchanged since August 30 except for the early signing bonus and the holiday-vacation option (*supra,* p. 15), had been presented only in outline form (Pet. App. C159). The Company refused to produce definitive contract language (which it had available) until the Union had indicated it was in total agreement with the Company's proposals and had signed the short form memorandum (Pet. App. C159–C163). Nor would the Company comply with the Union's request to sign a bilateral strike settlement agreement; instead it insisted on issuing a unilateral "letter of intent" stating how it "intends to handle * * * certain matters relating to resumption of work" (Pet. App. C165–C168). The Union terminated the strike as of October 24, 1960, and the formal agreements were finally concluded and executed on November 10, 1960 (Pet. App. C168, C173).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board and previously its Trial Examiner concluded that GE violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union during the 1960 contract negotiations. The Board based its conclusion "on the totality of the [Company's] conduct at and away from the bargaining table" (Pet. App. C252), including the fact that the Company had in effect entered into negotiations "'with a predetermined resolve not to budge from an initial position'"[6] and had further hardened that position by its campaign among the employees, by presenting an accident insurance proposal to the Union in June 1960 on a take-it-or-leave-it basis, by failing timely to honor the Union's written and oral requests for relevant information, by attempting to deal separately with IUE locals on strike truce terms which were properly the subject of national renegotiations, and by soliciting the locals separately to abandon or refrain from supporting the strike (Pet. App. C2–C3, C7).[7] The

[6] Quoting from *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154 (separate opinion of Frankfurter, J.).

[7] The Board also found the latter three actions to constitute independent violations of Section 8(a)(5) and (1) of the Act (Pet. App. C176–177, C194, C205–206, C213).

Members Leedom and Jenkins disagreed with the majority's conclusion that the Company's overall approach to and conduct of bargaining violated Section 8(a)(5) and (1) of the Act (Pet. App. C11–C21). Also, Members Jenkins and Fanning disagreed with the majority's conclusion that the Company's presentation of its accident insurance proposal violated Section 8

Board ordered the Company to cease and desist from the unlawful conduct found, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the Company to furnish the Union with information similar to that which had been requested, and to post appropriate notices (Pet. App. C10, C258–C262).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in an opinion by Judge Kaufman, enforced the Board's order, holding that "an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken" (Pet. App. A53). Judge Waterman concurred in a separate opinion, in which he stated that he did not differ "from the majority opinion in any way" or with the Board (Pet. App. A55–A56). Judge Friendly dissented from the court's action in sustaining the Board's finding of overall bad faith on GE's part and its finding of a specific unfair labor practice in GE's June offer of the accident in-

---

(a)(5) and (1), although Member Fanning believed that GE's take-it-or-leave-it position on that subject could properly be considered in gauging GE's overall good faith in the negotiations (Pet. App. C2, n. 3, C12).

The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 20 strikers who had been replaced, but this finding is not material to the Section 8(a)(5) violations described above or to the issues raised by the petition (Pet. App. C175, C253–C254).

surance plan. However, Judge Friendly agreed that the Company violated the Act by refusing to furnish cost information and by bargaining with locals during the strike (Pet. App. A57–A77).

ARGUMENT

A. The Board's finding that GE manifested overall bad faith in the 1960 contract negotiations, sustained by the court of appeals, was a correct application of settled legal principles to the voluminous facts of this particular case. The principles themselves, identifying bargaining tactics and posture so objectionable as to demonstrate lack of good faith, are neither novel nor in dispute. The only possibly novel feature of this case involves their application to an employer who, while using such tactics, nonetheless did appear willing to enter into an agreement—as long as it was the one which it had predetermined.[8] Given the fundamental correctness of the Board's inquiry into good faith, however, that possible novelty—tied as it is to the peculiar facts of

[8] The principles have also been applied to a union which attempted to impose an area standards contract in circumstances which made clear that "bargaining" with individual employers would not be entertained. *IBEW and Phil Sears Electric Service*, TXD–712–69, Case No. 9–CB–1445, adopted by the National Labor Relations Board in the absence of exceptions, January 28, 1970. There is, of course, no conflict with this Court's decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657, which observed in an entirely different context that "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers" (p. 665). Whether or not the union bargains in good faith in seeking such terms depends entirely, as it did with regard to GE here, on the particular facts of the particular negotiations.

these particular bygone negotiations—reflects no more than the Board's adaptation of its principles to a particular situation; in the absence of conflict, it raises no issue warranting this Court's review. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410.

1. In *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, this Court recognized that "[c]ollective bargaining * * * is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it';" though "the parties need not contract on any specific terms * * * they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground" (pp. 485, 486).[9] Similarly, in *National Labor Relations Board* v. *Katz*, 369 U.S. 736, the Court held that the parties must refrain not only from behavior "which reflects a cast of mind against reaching agreement," but from behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion" (p. 747). Thus, petitioner errs in assuming (Pet. 14–16) that an employer or a union discharges its bargaining obligation under the Act merely by displaying, as did GE, a willingness to enter into some form of agreement. As the Board pointed out (Pet. App. C210): " '[The] duty of management to bargain in good faith is essentially a corollary of

[9] See also Cox, *The Duty To Bargain In Good Faith*, 71 Harv. L. Rev. 1401, 1411 (1958): "To offer the union a contract saying, 'Take it or leave it,' is not bargaining collectively within the meaning of the act."

its duty to recognize the union.' [10] Performance of that duty therefore also contemplates full acceptance by management of the representative status of the Union, not as a bare advisor, but as a joint participant in the establishment of the wages, hours and working conditions."

2. Applying these principles, the Board was amply warranted in concluding that GE did not bargain in good faith in the 1960 negotiations. By adopting policies which stressed that its offer must be "right" if its research had been done properly, GE placed the burden on the Union to show at the outset that the offer was "wrong" in some respect before any changes would be made (while at the same time withholding that offer for a substantial part of the contractual bargaining period). These policies impaired the Company's ability to evaluate objectively any modification proposed by a particular union by insisting that all union and nonrepresented employees must be treated uniformly, and tied the Company's credibility and prestige to strict adherence to its dogma (*supra*, pp. 3–5; 17–18). In June 1960, even before negotiations opened, the Company presented an accident insurance proposal to the Union on an acknowledged take-it-or-leave-it basis (*supra*, p. 6). During the early meetings, devoted by agreement to bargaining on employment security, GE would not reveal its proposals, even in general form, and its responses to the Union's detailed proposals were vague and uninformative (*supra*, pp. 7–10). When the Company finally made its

[10] Quoting from *Insurance Agents' Union*, *supra*, 361 U.S. at 484–485.

offer, it refused to make meaningful cost disclosures or to furnish the Union with other relevant information, and took rigid positions which it sought to defend with inconsistent and confusing explanations (*supra,* pp. 11–18).

While maintaining this inflexible and unhelpful stand at the bargaining table, the Company mounted a campaign for the purpose of disparaging and discrediting the Union in the eyes of its employee constituents. Thus, the Company refused to withhold publicizing its offer of August 30 until the Union had had an opportunity to propose suggested modifications (*supra,* pp. 10–11). It repeatedly told its employees that it had made a "firm, fair offer," that there was "nothing more to come," and that it would not change its position in the face of "threats" or a strike (*supra,* pp. 11, 16–18). As the Board found, the Company thereby "locked itself into a position where it could not deviate significantly from its original offer without impairing the credibility with employees that it considered so basic to its employee relations and the success of its bargaining techniques" (Pet. App. C240).[11]

---

[11] Events during the strike provided further confirmation of the Company's lack of good faith. Thus, it unlawfully bypassed the IUE's national negotiators on strike truce terms to deal with local union officials (*supra,* p. 18); it insisted that the Union assent to the Company's offer without first seeing the final contract language (*supra,* p. 19); and it rejected the notion of a bilateral strike settlement agreement out of a "determination to adhere to the end to its basic bargaining philosophy, that employees must be made to understand that what it did it did 'voluntarily' and that union belligerence could not force it to make concessions of any kind, even to settle a strike" (Pet. App. C251–C252).

In sum, as the court of appeals concluded, the Board's inference of overall bad faith was based on a pattern of conduct which had two major facets: "first, a take-it-or-leave-it approach * * * to negotiations in general which emphasized both the powerlessness and uselessness of the Union to its members, and second, a communications program that pictured the Company as the true defender of the employees' interest, further denigrating the Union, and sharply curbing the Company's ability to change its own position" (Pet. App. A40). Such a combination of " 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness" constitutes "an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under section 9(a)" (Pet. App. A53).[12]

---

[12] Further emphasizing the limited nature of its holding, the court added (Pet. App. A52–A53): "We do not today hold that an employer may not communicate with his employees during negotiations. Nor are we deciding that the 'best offer first' bargaining technique is forbidden. Moreover, we do not require an employer to engage in 'auction bargaining,' or * * * compel him to make concessions, 'minor' or otherwise."

The basic difference between the court majority and the dissenting judge is that the latter found "no substantial evidence" that GE had adopted a "take-it-or-leave-it" attitude at the bargaining table (Pet. App. A67–A69), and, in his view, the Company's publicity campaign did not amount to a declaration that, as a matter of policy, the Company could never be persuaded to change the advertised terms (Pet. App. A74, n. 8). That disagreement on the facts does not require resolution in this Court.

3. The Board's finding of overall bad faith is not inconsistent with Section 8(d) of the Act, which states that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." As the court majority stated, "while the absence of concessions would not prove bad faith, their presence would, as GE claims, raise a strong inference of good faith" (Pet. App. A44). In short, the Board and the court majority evaluated the concessions allegedly made by the Company only because the Company itself insisted that they affirmatively demonstrated its good faith and lack of a take-it-or-leave-it attitude. Having thus placed the matter in issue, the Company is in no position to complain because the Board and court majority found, on analysis, that the concessions were of little substance (see Pet. App. A44, and n. 13).

Nor did the Board's reliance on the Company's communications to its employees run afoul of Section 8(c) of the Act. The legislative history of Section 8(c) discloses that Congress intended to prevent the Board from finding non-coercive expression of views, argument, or opinion to be an unfair labor practice, or to be evidence thereof when linked with wholly unrelated conduct; but it did not intend to alter the ordinary rules of evidence which make relevant communications, like relevant conduct, competent evidence as to motive or state of mind. Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), Vol. 1, 429–430 (Senate Report), 549 (House Conference Report); Vol. 2, 1541 (analysis of Senator

Taft). See also *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 62, n. 5; *Darlington Mfg. Co.* v. *National Labor Relations Board,* 397 F. 2d 760, 768–769 (C.A. 4), certiorari denied, 393 U.S. 1023. Consistent with this principle, the Board considered GE's communications "only as part of the totality of its conduct reflecting on the state of mind with which it entered into and participated in the negotiations" (Pet. App. C243–C244). As shown, such communications were clearly relevant for that purpose.[13]

Finally, there is no merit to the Company's contention that the Board's order is too vague. As the court of appeals explained, the order apprises the Company that it "may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that [it] is [itself] unable to alter a position once taken"; it "is this specific conduct that GE must avoid in order to comply with the Board's order, and not a carbon copy of every underlying event relied upon by the Board to support its findings" (Pet. App. A53).

B. The Board's holding, adopted by the court below, that the Company independently violated Section 8(a)(5) and (1) of the Act by its take-it-or-leave-it accident insurance proposal is clearly correct, and, in any event, does not, in itself, present an issue of

---

[13] For example, as the Board pointed out, the Company's adamant stand at the bargaining table in the latter part of September and the remarks of its negotiators that it would look ridiculous if it changed its offer "cannot be interpreted and evaluated except against the backdrop of the communications program" (Pet. App. C246).

sufficient importance to warrant further review. The Company contends that, since accident insurance was a matter covered by its existing collective bargaining contract with the Union, Section 8(d) of the Act relieved it of the duty to bargain about its June 1960 offer of additional coverage at least until negotiations commenced for a new contract.[14] However, as the Board concluded in *Equitable Life Insurance Co.*, 133 NLRB 1675, 1688–1694, the only other case where the precise issue has thus far arisen, the portion of Section 8(d) relied on by GE was designed for the protection of the party to a collective bargaining agreement who wishes to preserve the *status quo* as to matters covered therein, not for the party who wishes to change it. Where, as here, a party proposes a change during the contract term, he indicates a desire not to hold firm to the terms and conditions of the contract, at least with respect to that change. In this situation, there is no compelling reason for not requiring him to bargain about the proposal which he himself initiated, if the other party requests bargaining. Indeed, for the reasons given by the court below (Pet. App. A21), to permit an employer to offer a contract modification to a union on a take-it-or-leave-it basis tends to subvert the union's position as bargaining representative.

---

[14] Section 8(d) provides, in relevant part, that neither party shall be required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

C. The Board's conclusion that the Company had a duty to furnish the pension and insurance cost information which the Union had requested (see Pet. App. C187–C188) was unanimously affirmed by the court below (Pet. App. A25–A33, A57), and that conclusion is consistent with *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149. Accordingly, this issue also does not warrant further review. Petitioner's argument that what the Union desired was "not 'information' in the ordinarily accepted sense, but, rather, *predictions or estimates* * * *" (Pet. 36) is irrelevant. "The difficulty with this stand," the court below noted, "is that it would excuse the Company from furnishing virtually all information of which is was not absolutely certain"; the determinative factor is "whether the data 'would significantly aid in the bargaining process,'" and there is "no question that the information available would have assisted the Union here" (Pet. App. A33).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
EUGENE B. GRANOF,
Attorney,
National Labor Relations Board.

FEBRUARY 1970.

Office Supreme Court, U.S.
FILED
FEB 24 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER IN REPLY

DAVID L. BENETAR
NORDLINGER, RIEGELMAN, BENETAR & CHARNEY
420 Lexington Avenue
New York, New York 10017
Counsel for Petitioner

ROBERT C. ISAACS
MICHAEL I. BERNSTEIN
STANLEY SCHAIR
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER IN REPLY

ARGUMENT

In a combined total of 59 pages the briefs submitted on behalf of Respondents argue that no question involved in this case is worthy of review by this Court.

This brief will be limited primarily to Petitioner's reply to the two principal lines of argument pursued, respectively, in Respondents' briefs. The first—that the decision merely involves the application of settled and undisputed

legal principles—is argued in the Board's brief. The second—that it involves no more than an assessment of particular factual considerations—is the main theme of the Union's brief. A third contention—an outgrowth of the first two—that the decision in this case is without importance or widespread significance, will also be briefly treated in this reply.

A. The Novelty of the Questions Here Presented

Refuting the contention of routineness advanced by the Board are the facts that the central condemnation was not of the Company's conduct but of its approach to bargaining,[1] and that the Company's rights under Sections 8(c) and 8(d) of the National Labor Relations Act, as amended ("the Act"), were invaded by a decision which forbade that approach.[2] Indeed, the novelty of the question was admitted, albeit guardedly, in the Board's brief on this Petition in the following language (Bd. Br. 22):[3]

> "The only possibly novel feature of this case involves their application to an employer who, while using such

---

[1] As observed in the concurring opinion of Board Member Jenkins (Pet. App. C 12):

> "However, in view of the fact that the majority has gone beyond conduct and indeed concedes that it is not basing its finding of overall bad faith on conduct but rather is basing that finding on an assessment of the Respondent's [GE's] approach to its duty to bargain in good faith, I am constrained to disavow their comments concerning the employer's bargaining technique."

[2] See Petition 12-32.

[3] References to the Board's and Union's briefs in opposition shall sometimes be made, respectively, as follows: Bd. Br. and U. Br.

> tactics, nonetheless did appear willing to enter into an agreement—as long as it was the one it had predetermined." [4]

Despite efforts, particularly in the Union's brief, to obscure the clarity of the questions here presented by references to alleged threats or promises in the communications, the fact is that the restrictions imposed on communications in this case were not directed to alleged threats or promises. They represent an interdiction against a bargaining policy and a communication of it to employees because their combined effect allegedly was to inhibit concessions beyond those contained in an initial offer. No decision of this Court has ever approved so sweeping an arrogation of power by the Board.

B. The Irrelevancy of the Union's Factual Argument

The Union's brief essentially is preoccupied with quoting selected factual findings, or portions thereof, made by the Board's Trial Examiner in his Intermediate Report (appearing in its entirety at Pet. App. C 22-267), ignoring for the most part the legal principles for which the case stands. Indeed, the major argument it has elected to present in opposition to review of the central holding in this case is purely factual in character. It contends here, as it did in the court below, that the Company did not possess a genuine desire to enter into an agreement (U. Br. 13-16).

---

[4] The use of the word "predetermined" in this context is misleading since the Trial Examiner expressly found that the Company's overall offer was not finally decided upon until several days before it was presented. This was some six weeks after negotiations began (Pet. App. C 81 and n. 23).

For the Union to challenge this long-decided factual issue or any other in this forum is not only inappropriate and impermissible but serves only to divert attention from the important legal principles involved. Petitioner herein is not seeking a review which would require this Court to make an assessment of the record evidence under the doctrine of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). The questions posed by it for review relate solely to the settlement of legal principles and standards governing the basic nature of the duty to bargain under the Act.

As far as the Company's desire to reach agreement is concerned, the Union's effort to deny its existence is futile. The Board's own brief in opposition to this Petition contains an admission (quoted at page 3 *supra*) of Company willingness to make an agreement, and an actual concession of desire to do so was made by the Board's General Counsel at the hearing in the following exchange (Tr. 276-77):

> "Mr. Benetar: May I ask from the Trial Examiner if the allegation of bad faith here does not go to the desire of the company to reach agreement, but as to the method it pursued in reaching it?
>
> "Mr. Richman [Counsel for the General Counsel]: Exactly."

See Intermediate Report of Trial Examiner Pet. App. C 207; see also Pet. App. C 3-5, 18-19.

C. The Significance of This Case

Whatever specific findings of refusal to bargain in specific instances may have been made in this case, the lead opinion below leaves no room for doubt that the rule of law which it sees as governing this case is:

> "We hold that an employer may not so combine 'take-it-or-leave-it' bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken." Pet. App. A 53.[5]

That opinion made this controlling quality explicitly clear when, after enunciating the rule just quoted, it added (*ibid.*):

> " . . . . It is this specific conduct that GE must avoid in order to comply with the Board's order, and *not* a carbon copy of *every underlying event relied upon by the Board to support its findings . . . .* " (Italics ours.)

The statement of this Court in *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (1923), quoted in *N.L.R.B.* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 503 (1951) (cited by Respondent-Union), that certiorari is granted "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," seems directly pertinent here. There is hardly a case in recent years in the area of labor-management relations which has stirred such widespread public comment and interest as that which is before this Court on the instant Petition. Appendix "A", attached hereto, lists a sampling of the news items and editorial comments which the Board's decision herein evoked and which appeared

---

[5] Even the Board's brief in opposition to this Petition recognizes that significant changes in the Company's offer were made, thereby revealing the emotional rather than factual quality of the label "take-it-or-leave-it." Thus, in its brief (page 15) it refers to the Company's "*first* change of any *significance* in its offer of August 30." (Italics ours.) See also in this connection dissenting opinion by Friendly, J. Pet. App. A 65-66.

within the short space of approximately five weeks from the announcement of the decision. In professional journals as well, as noted in our Petition (12 n. 9), discussion of this case and of its implications was rife. We list in Appendix "B" hereto many of the legal periodicals in which the case has been analyzed and discussed. Some pertinent illustrative excerpts from these articles on the novelty and importance of the questions involved are also contained therein. In addition to the foregoing, the Labor Board decision and Trial Examiner's Intermediate Report have been included in the two leading law school case books on labor law. Cox & Bok, Labor Law 430 (Seventh Edition); Summers & Wellington, Labor Law—Cases and Materials 606 (1968).

No case of overall bad faith which turned entirely upon a particular and peculiar set of facts governed by undisputed legal principles would or could, we submit, have so roused the lay and professional community as did this one. The very intensity of the response to the publication of the decision puts at rest once and for all the attempt to mask or present this case as a run-of-the-mill decision.

CONCLUSION

For these reasons and those set forth in the Petition therefor, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

DAVID L. BENETAR
NORDLINGER, RIEGELMAN, BENETAR
& CHARNEY
420 Lexington Avenue
New York, New York 10017
Counsel for Petitioner

ROBERT C. ISAACS
MICHAEL I. BERNSTEIN
STANLEY SCHAIR
Of Counsel

February 23, 1970

APPENDIX "A"

News and Editorial Comments

1. Washington Post, Dec. 26, 1964, "Good Faith Bargaining."

2. New York Journal-American, Dec. 31, 1964, *"These Days:* And Now: Trial By Mind Readers? by John Chamberlain."

3. Wall Street Journal, Dec. 22, 1964, "Review and Outlook—Ruling Out Bargaining."

4. St. Louis Globe Democrat, Dec. 21, 1964, "NLRB's Arbitrary Censorship."

5. The Boston Herald, "Judging 'Good Faith'."

6. Evening-Eagle Tribune, Lawrence, Mass., Dec. 23, 1964, "Unreasonable Decision."

7. Dallas Morning News, "At Random—Order to the Boss: Shut Up!"

8. Milwaukee Sentinel, Dec. 21, 1964, "NLRB Logic."

9. Tulsa Tribune, Dec. 17, 1964, "Gagging the Boss."

10. Detroit Free Press, Dec. 18, 1964, "Playing Free with the First."

11. The Iron Age, Dec. 24, 1964, "NLRB Ruling: Pay Now—Keep Quiet Later."

12. Newsweek, Jan. 4, 1965, "Abridging Free Speech by Henry Hazlitt."

13. New York World Telegram, Dec. 18, 1964, "The GE Case."

14. The Miami Herald, Jan. 4, 1965, " 'Unfair' For Employe To Hear An Offer? by James J. Kilpatrick."

15. Danville Commercial News, "Editor's Notebook—Labor Relations Board Decision Alarms Many."

16. New York World Telegram, Dec. 28, 1964, "Bill of Rights Denied, by Lawrence Fertig."

17. Arizona Daily Star, "A Superior Legal Status For Unions."

18. The Milwaukee Journal, "Doubtful Labor Decision."

19. Jefferson City Post-Tribune, "Free Speech for Some."

20. (Portland) Oregon Journal, "Rulings On Labor-Management Relations Reveal New Trend."

21. (Spokane) Spokesman-Review, "Labor Board Ruling Has Unfair Curb."

22. Caldwell (Idaho) News Tribune, "A Loud 'Phooey'!"

23. Bellingham (Wash.) Herald, "Time for a Look at NLRB Powers and Policies."

24. Human Events, Jan. 2, 1965, "Free Speech at Issue —NLRB Strikes Down 'Boulwarism' by Donald I. Rogers."

25. New York Times, Dec. 18, 1964, "A Tough Week For Management By Arthur Krock."

26. St. Petersburg Times, Dec. 18, 1964, " 'Good Faith' And Free Speech."

27. Long Beach Independent, "A Cause For Concern."

28. Rockford Morning Star, Dec. 23, 1964, "NLRB Ruling Is One-Sided."

29. Baltimore Sun, "How to Bargain."

30. Chicago Tribune, Dec. 18, 1964, "Freedom of Speech For Employers."

31. Albany Knickerbocker News, Dec. 17, 1964, "IUE Leader Assails Union For NLRB Ruling on GE."

32. Detroit News, Dec. 21, 1964, "NLRB on Bargaining 'Rights'—What's Good For One . . ."

APPENDIX "B"

Legal Periodicals

1. Cooper, *Boulwareism and the Duty to Bargain In Good Faith,* 20 Rutgers L. Rev. 653, 673 (1966):

> ". . . However, the Board did not limit itself to this function in the *GE* case; it applied a different standard to GE's conduct from any which it had previously used. . . . The Board's opinion in the *General Electric* case may be a considerable departure from previous case law. . . ."

2. Forkosch, *"Take It Or Leave It" As A Bargaining Technique,* 3 Calif. W.L. Rev. 43, 62:

> "This decision therefore presents a most important question for labor-management relations in bargaining. . . ."

3. Comment, *General Electric's Firm Offer Approach Bad Faith,* 40 N.Y.U.L. Rev. 798, 799, 800 (1965):

> "Because of the language of the majority opinion, however, there is serious doubt that the Board's holding was so conventional. . . . The implication of these broad statements may well presage a major realignment in the Board's approach to the bargaining obligation. . . .
>
> "If these possibilities reflect accurately the new position of the Board, the Board appears to have strayed from the language and policy of the NLRA. . . ."

4. Adams & Coleman, *Can Collective Bargaining Survive the Board?*, 52 Geo. L.J. 366, 373, 376 (1964):

> "But there is increasing evidence that the Board, particularly at the trial examiner level, is ignoring the statutory restrictions and the Supreme Court's admonitions. The recent report by the trial examiner in the *General Elec.* case is a classic case in point. . . .
>
> "The Board's recent decisions present several serious questions for the future of collective bargaining. What has become of the Supreme Court's view that an employer (or union) need *not* 'engage in fruitless marathon discussions at the expense of frank statement and support' of his position? What has become of the statutory right in good faith to withhold agreement and to decline concessions?"

5. Case Note, 1965 Duke L.J. 661, 665-66:

> "Although the Board expressly disclaimed any intention to freeze methods of collective bargaining into an inflexible mold, arguably it has done just that. . . ."

6. Maxwell, *The Duty to Bargain in Good Faith, Boulwareism And a Proposal—The Ascendance of the Rule of Reasonableness*, 71 Dick. L. Rev. 531, 550, 558 (1967):

> "In destroying the GE bargaining method under its Boulwareism approach, the Board may have frozen methods of collective bargaining into an inflexible mold . . . .
>
> "While the effects of the *GE* decision will be felt most strongly at GE, it will certainly make an impression on the whole of modern management."

7. Case Note, 63 Mich. L. Rev. 1473, 1479 (1965):

"... However, the majority opinion of the Board seems to transcend even the flexible standard of the traditional good faith requirement and to condemn Boulwareism totally."

8. Case Note, 43 Texas L. Rev. 974, 977-78 (1965):

"The Board, declaring General Electric's conduct violative of Section 8(a)(5), significantly narrowed the scope of a party's privilege to make no concession. . . .

[And on GE's publicity campaign]

"The Board apparently did not deem significant section 8(c) . . . ."

9. BNA "Labor Relations Reporter," November 3, 1969, 72 Analysis 37:

"The General Electric case was the first, however, in which the National Labor Relations Board sought to deal with an entire approach to bargaining."

10. Booker & Coe, *The NLRB and its Critics,* 17 L.L.J. 522 (1966).

11. Duvin, *The Duty To Bargain: Law In Search of Policy,* 64 Colum. L. Rev. 248 (1964).

12. Kirby, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining,* 63 Nw. U. L. Rev. 40 (1968).

13. Kuelthan, *The NLRB and the Duty to Make Concessions in Bargaining,* 18 L.L.J. 201 (1967).

14. Wellington, *Freedom of Contract and the Collective Bargaining Agreement,* 112 U. Penna. L. Rev. 467 (1964).

15. Comment, *Employer's Statutory Duty To Bargain,* 32 Fordham L. Rev. 557, 571 (1965).

16. *Recent Decision,* 38 Temp. L.Q. 353 (1965).

17. Case Note, 53 Geo. L.J. 115 (1965).

18. Case Note, 6 B.C. Ind. & Com. L. Rev. 949 (1965).

19. Case Note, 76 Harv. L. Rev. 807 (1963).

20. *Recent Developments,* 38 Wisc. B. Bull. 8 (1965).

21. A.B.A. Rep., *Section of Labor Relations Law* 150 (1965).

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 26 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

DAVID L. BENETAR
NORDLINGER, RIEGELMAN, BENETAR & CHARNEY
420 Lexington Avenue
New York, New York 10017
Counsel for Petitioner

ROBERT C. ISAACS
MICHAEL I. BERNSTEIN
STANLEY SCHAIR
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an order (1) vacating the Court's denial of its petition for a writ of certiorari, entered on March 2, 1970, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. *The decision of this Court in H. K. Porter Company v. N.L.R.B., No. 230, Oct. Term 1969.*

On March 2, 1970, this Court issued its decision in *H. K. Porter Company* v. *N.L.R.B.*, No. 230, Oct. Term 1969, reversing and remanding that case to the Court of Appeals. In doing so, it laid down and defined further the rules of law regarding the duty to bargain and delimiting the scope of the Labor Board's power over the collective bargaining process under the National Labor Relations Act, as amended ("the Act"). The rule enunciated and followed in the case at bar conflicts in numerous respects with that followed in *H. K. Porter.*

Thus, this Court stated that (1) a fundamental policy underlying the Act is "freedom of contract," (2) the Board is unauthorized, "either directly or indirectly [to] compel concessions" in bargaining and (3) the Act does not forbid "an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." The Court of Appeals in the case at bar, however, condemned a bargaining policy which, in effect, did no more than express and emphasize (a) a willingness by the employer to rely ultimately on its economic strength, if need be, to obtain the acceptance of an offer which it believed was fair and right and (b) its determination to make no further concessions in bargaining than were contained in and thereafter added to that offer solely because of a threat of a strike by the union.

But this Court's majority in *H. K. Porter* denied *any* requirement of concession under the Act. Even the dissenting justices saw the ruling principle of good faith bargaining as being a desire to reach an agreement and the limit of

the Board's authority as "restricted to the clear case where the refusal [to grant a concession] is aimed solely at avoidance of *any* agreement." (Emphasis ours.) The case at bar falls clearly outside this highly restricted area of Board regulatory authority over collective bargaining (see Petition 12-16).

A further conflict: At the heart of the Court of Appeals' condemnation was the finding that the Company's bargaining policy when combined with publication thereof to its employees somehow tended to inhibit concessions in bargaining and made the Union appear "useless" and "powerless." Counsel for the Union herein described his view of the impact of this Court's denial of certiorari on March 2, 1970, in the following terms:

> "The Supreme Court has ended any doubt that may have existed about the unlawfulness of Boulwarism, the policy of take-it-or-leave-it negotiating, buttressed by a communications system designed to establish in the minds of the membership the *finality* of the company's offer and the *uselessness of the union.*" * (Emphasis ours.)

The concept that expressions to employees of an employer's resolution in bargaining may be lawfully curtailed or forbidden as presenting a union as "useless," however, is at odds with the decision in *H. K. Porter*. That decision permits the employer to refuse a checkoff even where such refusal was found to have been grounded on a resolve not to "aid and comfort the union." The notion that an employer need assume the burden of maintaining a union's prestige was also rejected by the Court of Ap-

* The full text of the statement is annexed hereto.

peals for the Seventh Circuit in *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144, 151 (1951):

> "It was not necessary of course that respondent praise the Union for, in the words of Mr. Justice Rutledge in a concurring opinion in May Department Stores v. N.L.R.B., 326 U.S. 376, 66 S. Ct. 203, 216, 90 L. Ed. 145 'Nothing in the Act requires an employer to maintain a union's prestige or give it credit for originating all proposals which may have some future effect upon his relation with his employees. Section 8(1) forbids interference, coercion and restraint upon employees, in the exercise of their rights, not the mere failure of the employer to magnify the union's influence.'"

2. *The vague limitations on the employer's right of free speech contained in the decision below.*

As evidenced by the counsel for the Union's statement annexed hereto, the decision below has been read as barring communications by an employer to his employees of its views as to "the finality of the company's offer." If the First Amendment and Section 8(c) permit of limitations on the expression of such views by an employer to his employees, their perimeters should be described by this Court.

As the law now stands, by virtue of this case doubt has been created as to whether a party is protected in adopting and publishing a policy statement that its first offer holds back nothing intentionally for later trading (albeit will be changed if shown to be wrong in some way). Further doubt has been created and is already being fostered by the Union (see quote p. 3, *supra*) as to whether a party may make an unqualified statement of such finality after two months of collective bargaining negotiations.

3. *The pejorative "take-it-or-leave-it" label.*

The extent to which the undefined use of the "take-it-or-leave-it" label herein has already begun to lead to confusion concerning precisely what the much discussed and debated GE case stands for is evident from a recent article in the New York Law Journal (March 3, 1970). Even that sophisticated and legally oriented publication was misled by this vague indictment to read this case as one where the Company puts its best offer on the table "at the start of negotiations." Thus again is pointed up the need for an authoritative adjudication as to the limits on bargaining applicable to an employer who wishes accord but openly seeks to achieve it on terms which it sees as healthy for the future of its business and not on terms which are simply imposed by superior or overwhelming economic power.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

David L. Benetar
Nordlinger, Riegelman, Benetar & Charney
Counsel for Petitioner

Dated: March 26, 1970

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

DAVID L. BENETAR
Counsel for Petitioner

APPENDIX

NEWS RELEASE

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS • AFL-CIO • CLC

PAUL JENNINGS, President • DAVID J. FITZMAURICE, Secretary-Treasurer

1126-16th STREET, N.W. • WASHINGTON, D. C. 20036 202-296-1200

RECEIVED MAR 4 1970 LAUGHRAN WABER

FOR IMMEDIATE RELEASE
March 2, 1970

WASHINGTON--The U.S. Supreme Court's denial today of an appeal by the General Electric Co. from the Oct. 28, 1969, U.S. Court of Appeals ruling that the company's 1960 bargaining practices were illegal, has been hailed by the International Union of Electrical, Radio and Machine Workers.

"The denial action represents the Supreme Court's refusal to resurrect the corpse of 'Boulwarism,'" commented IUE General Counsel Irving Abramson.

"The Supreme Court has ended any doubt that may have existed about the unlawfulness of Boulwarism, the policy of take-it-or-leave-it negotiating, buttressed by a communications system designed to establish in the minds of the membership the finality of the company's offer and the uselessness of the union."

IUE President Paul Jennings, reaffirming his comments following the recent negotiations and settlement of the 1969-70 strike, expressed the hope that a more fruitful policy will be adopted by GE.

"We in IUE stand ready to work with GE for a better way of doing things, to make the satisfaction of human needs and the enhancement of human dignity GE's finest product," Jennings said. "This court decision can be the occasion for GE to enter a new era of full recognition of the unions of its employees and to work with them in resolving the employees' problems."

The Supreme Court's action left standing the Second Circuit Court's decision enforcing a 1964 ruling by the National Labor Relations Board that GE's Boulwarism practices were illegal as applied in 1960 contract talks.